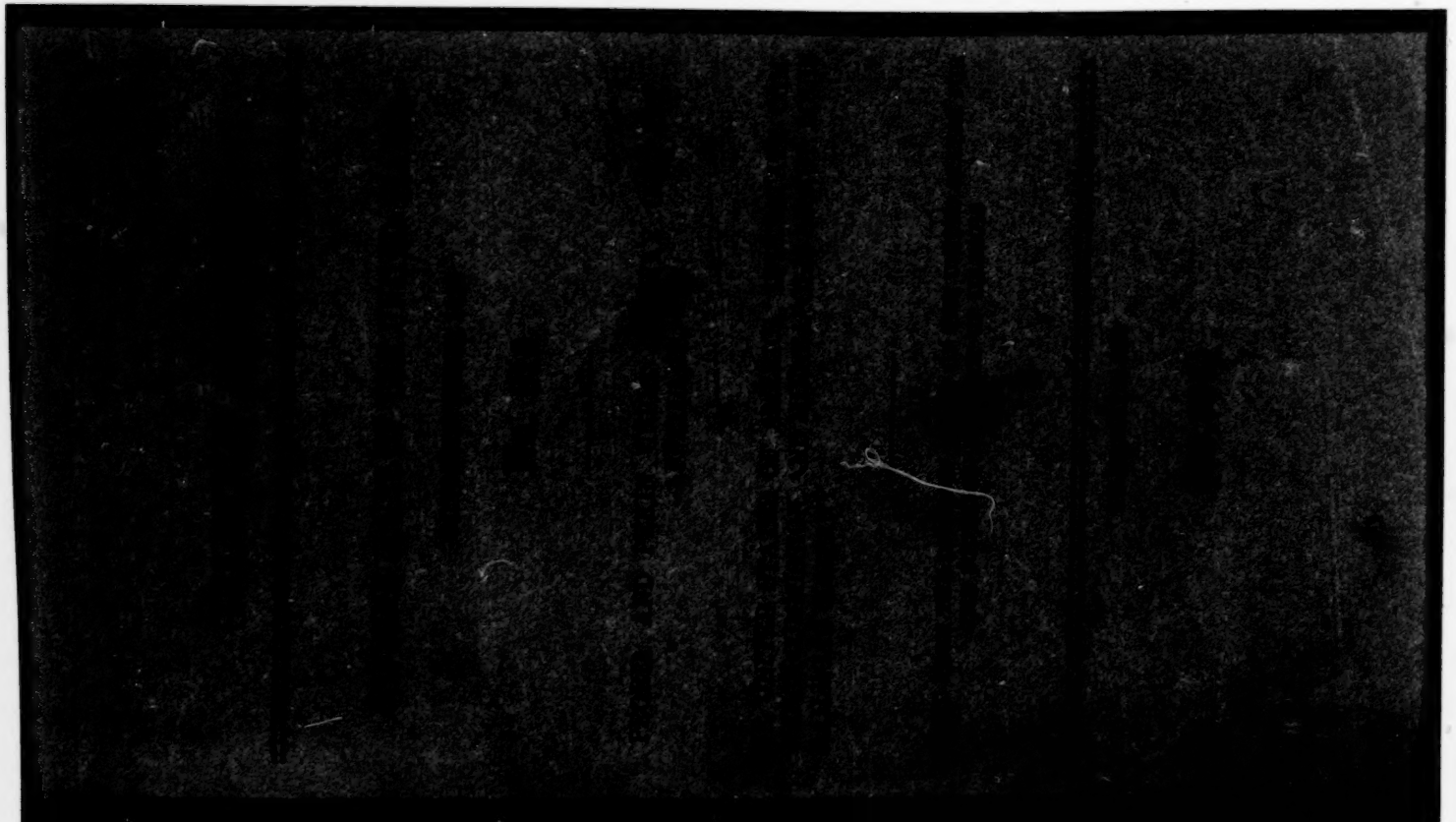

(29,594)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923

No. 318

PEORIA AND PEKIN UNION RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND MINNEAPOLIS AND ST. LOUIS RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS

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[fols. 1 & 2] Pleas in the District Court of the United States of America, within and for the Northern Division of the Southern District of Illinois, held at the City of Peoria, in said Division and District, before the Honorable George T. Page, United States Circuit Judge, the Honorable Louis Fitz Henry, United States District Judge, and the Honorable George W. English, United States District Judge, on Monday, the nineteenth day of February, in the year of our Lord, one thousand nine hundred and twenty-three and of the Independence of the United States of America, the one hundred and forty-seventh year.

Attest:

S. T. Burnett, Clerk.

[fol. 3] IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION

In Equity. No. 205

PEORIA & PEKIN UNION RAILWAY COMPANY, Plaintiff,

vs.

THE UNITED STATES OF AMERICA, Defendant

Be it remembered that heretofore to wit: On the 25th day of January, in the year of our Lord one thousand nine hundred and twenty-three, that being one of the days of the October Term, A. D. 1922, of the District Court of the United States for the Northern Division of the Southern District of Illinois, came the plaintiff in the above entitled cause and filed its bill of complaint herein, which said bill of complaint was and is in the words and figures, following, to wit:

[fol. 4] IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION

[Title omitted]

BILL OF COMPLAINT—Filed Jan. 25, 1923

To the Honorable District Court of the Southern District of Illinois:

1. Plaintiff, Peoria & Pekin Union Railway Company, a Corporation, is a citizen and resident of the State of Illinois, and of the Southern District thereof.

The Defendant is The United States of America, and this suit is brought under the Act of Congress, approved October 22, 1913, commonly known as the District Court Jurisdiction Act, for the

purpose of having suspended, cancelled and set aside a certain order of the Interstate Commerce Commission known as Service Order 37, a copy of which said order is attached to this Bill of Complaint, marked Exhibit 1, and is asked to be taken as a part hereof. The said Service Order No. 37 was not made upon the petition of any party or parties, but the subject matter thereof arises in Peoria County, Illinois, in the Southern District of Illinois, where Plaintiff, Peoria & Pekin Union Railway Company has its principal office.

2. Plaintiff respectfully shows that it is a railroad corporation incorporated under the General Railroad Act of the State of Illinois on September 25, 1880, and that under the terms of its articles of incorporation it has the right to construct, maintain and operate a [fol. 5] railroad extending from the City of Peoria, in Peoria County, Illinois, through said City of Peoria to, into and through the City of Pekin, in Tazewell County, Illinois. Plaintiff since the time of its incorporation continuously up to the present date has operated a railroad as authorized by the said articles of incorporation, which railroad has been engaged among other things in performing certain switching and terminal railroad service as will be hereinafter more explicitly set out and described.

3. Plaintiff further shows that some time after its incorporation as aforesaid it entered into a contract with a number of other railroad companies operating into and near the vicinity of the cities of Peoria and Pekin whereby it was agreed between Plaintiff and these other railroad companies that Plaintiff should perform certain switching and terminal services for the said other railroad companies upon terms and under restrictions fully set out in the said contracts. Plaintiff shows that contracts which it entered into with these railroad companies operating railroads into and near the cities of Peoria and Pekin are all substantially to the same tenor and were in substance and effect as set out in a certain document filed as Exhibit 2 to this Bill of Complaint and asked to be taken as a part hereof, which document will hereafter be referred to for brevity as the General Contract. This contract was entered into between Plaintiff and the railroad companies therein named on February 1, 1881. Of the railroads named therein, Indiana, Bloomington & Western Railway Company named as party of the second part, is the predecessor in title of the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company, which has succeeded to all the rights under said contract of the Indiana, Bloomington & Western Railway Company; Wabash, St. Louis & Pacific Railway Company, named in the said contract as party of the third part, is the predecessor in title of the Toledo, Peoria & Western Railway Company, Samuel M. Russell, Receiver, which has succeeded to all the rights under the said contract of the said Wabash, St. Louis & Pacific Railway Company; the Peoria & Jacksonville Railway Company, named in the said contract as [fol. 6] party of the fourth part, is the predecessor in title of the Chicago, Peoria & St. Louis Railroad Company, Bluford Wilson and William Cotter, Receivers, which has succeeded to all the rights under the contract of the said Peoria & Jacksonville Railway Com-

pany; the Peoria, Decatur & Evansville Railway Company, named in the said contract as party of the fifth part, is the predecessor in title of Illinois Central Railroad Company, which is entitled under the contract to all the rights of the said Peoria, Decatur & Evansville Railway Company. In addition to the railroad companies named in the said General Contract, other railroad companies from time to time, to-wit, Pittsburgh, Chicago, Cincinnati & St. Louis Railroad Company, Lake Erie & Western Railroad Company, Chicago & North Western Railway Company, Chicago & Alton Railroad Company, W. G. Bierd, and W. W. Wheelock, Receivers, have entered into similar contracts with Plaintiff, providing for the use of the facilities of Plaintiff and providing for services to be performed by Plaintiff in the matter of switching and interchanging cars upon terms set out in the several contracts which are all substantially of the tenor and purport of the General Contract.

4. Plaintiff charges that heretofore, to-wit, on the first day of February, 1884, Plaintiff entered into a contract with Iowa Central Railroad Company of the general tenor and purport of the said General Contract whereby it was agreed between Plaintiff and the said Iowa Central Railroad Company that the said Iowa Central Railroad Company should use certain facilities of Plaintiff, located in the vicinity of Peoria, Illinois, and that Plaintiff should perform certain services for the said Iowa Central Railroad Company in the matter of switching and transferring cars from the Iowa Central Railroad Company to other railroad companies operating in and near Peoria, and from such other railroad companies to the Iowa Central Railroad Company upon terms and conditions set out in the said contract. On or about the 20th day of December, 1911, the said Iowa Central Railroad Company ceased to exist as an [fol. 7] operating railroad company and all its property, franchises, rights and contracts were transferred to the Minneapolis & St. Louis Railroad Company which for a long time continued to operate into and through Peoria, Illinois, under the terms of the said contract previously entered into between Plaintiff and the said Iowa Central Railroad Company, and Plaintiff charges that the Minneapolis & St. Louis Railroad Company ratified and confirmed and adopted the said contract so entered into between Plaintiff and the said Iowa Central Railroad Company.

5. Plaintiff further shows that for more than thirty-five years, or from the date of the execution of the said contract between said Iowa Central Railroad Company and the Plaintiff, up to April 1, 1921, the Minneapolis & St. Louis Railroad Company and its predecessor in title, the Iowa Central Railroad Company used the facilities of Plaintiff and called upon Plaintiff to perform the services mentioned in the said contract upon the terms therein provided, which services and facilities were substantially as follows: (When the term "Minneapolis & St. Louis Railroad Company" is used in this bill, it will be understood as referring as well to its predecessor in title, Iowa Central Railroad Company, whenever such reference is

appropriate). Minneapolis & St. Louis Railroad Company does not connect directly with certain other railroads entering Peoria or having facilities in the neighborhood of Peoria, such as Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Toledo, Peoria & Western Railway Company, Chicago, Peoria & St. Louis Railroad Company, Pennsylvania Railroad Company, Chicago & North Western Railway Company, Lake Erie & Western Railroad Company, Chicago & Alton Railroad Company and Illinois Central Railroad Company. In order to interchange through traffic moving from the Minneapolis & St. Louis Railroad Company to the other lines above-mentioned or moving from the above-mentioned lines to the Minneapolis & St. Louis Railroad Company, it is necessary to use the facilities and engage the services of Plaintiff in order to make the interchange. Thus, for illustration, the rails of the Minneapolis & St. Louis Railroad Company end at a point known as Bartlett [fol. 8] Yard in the southwestern corner of the City of Peoria, whereas the rails of the Lake Erie & Western Railroad Company do not extend beyond a point west of the East Peoria Yard, owned by Plaintiff, on the east side of the Illinois River, opposite the City of Peoria. It is necessary, therefore, for some arrangement to be made whereby traffic shall be transferred from the end of the rails of the Minneapolis & St. Louis Railroad Company to the rails of other railroad companies situated similarly to the said Lake Erie & Western Railroad Company with which the traffic is being interchanged and in the opposite direction. For many years, to-wit, about thirty-five years, as aforesaid, the Minneapolis & St. Louis Railroad Company, under the provisions of this contract operated its trains from said point, Bartlett Yard, which is the point where the rails of Plaintiff have their junction with the rails of said Minneapolis & St. Louis Railroad Company over the facilities of Plaintiff, to whatever point Plaintiff had established as the point of interchange, and said Minneapolis & St. Louis Railroad Company paid to Plaintiff for the use of these facilities, as well as certain other facilities necessary for the conduct of the passenger business of the Minneapolis & St. Louis Railroad Company, the sum of $22,500 per year, this being the same amount that was paid by all other railroad companies having similar contracts with Plaintiff. In addition to this amount, the Minneapolis & St. Louis Railroad Company paid its part of the expense of maintaining and keeping all of the said property used in common in repair, based on the use which the said Minneapolis & St. Louis Railroad Company made of the facilities of Plaintiff. In addition to these sums, for each car so handled the Minneapolis & St. Louis Railroad Company paid to Plaintiff a certain switching charge which varied from time to time, but which was the same as was imposed upon every other railroad company having a similar contract, which switching charge was paid to Plaintiff for the service of making up and breaking up trains and effecting a transfer to and from the Minneapolis & St. Louis Railroad Company of all cars of [fol. 9] freight interchanged with other railroads operating in and near the vicinity of Peoria.

6. For this period of approximately thirty-five years the Minneapolis & St. Louis Railroad Company recognized its duty to pay for the services so performed by Plaintiff and for the facilities of Plaintiff so used by the Minneapolis & St. Louis Railroad Company, in precisely the same manner as did all other railroad companies entering Peoria or operating in its vicinity under similar contracts. During this period of approximately thirty-five years the Minneapolis & St. Louis Railroad Company and other railroads operating in and near the vicinity of Peoria and using the facilities of Plaintiff under the General Contract, or contracts of similar tenor, established many joint through rates to which said Minneapolis & St. Louis Railroad Company was a party and fixed divisions thereof by agreement between the Minneapolis & St. Louis Railroad Company and other railroad companies at a time when Minneapolis & St. Louis Railroad Company was paying the Plaintiff under the said contract the amounts there agreed on for the transfer of traffic moving to and from the Minneapolis & St. Louis Railroad Company from and to other railroad companies operating into and in the vicinity of Peoria having contracts with Plaintiff. These divisions were fixed by the parties in contemplation of the then-existing practices and the then-existing contract obligations by which the Minneapolis & St. Louis Railroad Company paid its fair share of the expense of interchanging through traffic with its connections at Peoria.

7. Plaintiff further shows that in order to effect an interchange of traffic between the Minneapolis & St. Louis Railroad Company and other railroads operating into and through Peoria, Illinois, it has always been necessary for the railroad companies effecting the interchange to use the facilities and employ the services of Plaintiff. It is a well-understood railroad practice that, in the absence of some special reasons to the contrary, whenever two railroad companies interchange traffic and are obliged to employ the services of a third railroad company or use the facilities of such railroad company to bring about the interchange, each railroad company shall pay approximately one-half of the expense of making the said transfer, [fol. 10] or what is precisely the same thing, the railroad company delivering traffic to the other shall pay the entire expense in making such delivery. Under this established practice for the said period of approximately thirty-five years the Minneapolis & St. Louis Railroad Company recognized its duty to pay its fair share of the expense of effecting a transfer of cars moving from and to the Minneapolis & St. Louis Railroad Company to and from its connections at and in the vicinity of Peoria and did pay the sums mentioned in the contract for such services. During a considerable part of this period and particularly for the five years immediately prior to April 1, 1921, the point of interchange as between the Minneapolis & St. Louis Railroad Company and other railroads operating in and near the vicinity of Peoria was the East Peoria Yard of Plaintiff which Plaintiff has designated as the point of interchange, it being the right and privilege of plaintiff under the terms of the contract as well as established railroad practice to designate the

point of interchange. The Minneapolis & St. Louis Railroad Company had acquiesced in this designation by Plaintiff of the East Peoria Yard as the point of interchange. During the continuance of the said contract between Plaintiff and the Minneapolis & St. Louis Railroad Company the Minneapolis & St. Louis Railroad Company used the facilities and employed the services of Plaintiff to transfer cars from and to Bartlett Yard, where the rails of the Minneapolis & St. Louis Railroad Company connected with the rails of Plaintiff, to and from the said East Peoria Yard, the established point of interchange, and for the facilities so furnished and the services so rendered Minneapolis & St. Louis Railroad Company continuously for the said period of approximately thirty-five years up to April 1, 1921, paid Plaintiff under the contract an amount which varied from time to time with the expense of operation but which was in all cases precisely the same as was paid by other railroad companies for similar facilities used by them and similar services performed by them in effecting an interchange of traffic.

[fol. 11] Some time prior to April 1, 1921, to-wit, on the 31st day of December 1920, the Minneapolis & St. Louis Railroad Company gave notice to the Plaintiff that effective on April 1, 1921, it, the Minneapolis & St. Louis Railroad Company, would no longer be bound by the provisions of the said contract theretofore in force between Plaintiff and said Minneapolis & St. Louis Railroad Company and on said date, to-wit, April 1, 1921, the contract between the Minneapolis & St. Louis Railroad Company and the Plaintiff ceased to be in effect. Thereafter the Minneapolis & St. Louis Railroad Company insisted that Plaintiff should perform the service of effecting a transfer between the Minneapolis & St. Louis Railroad Company and other railroad companies operating into and near Peoria, Illinois, without any compensation whatever to be paid by the Minneapolis & St. Louis Railroad Company, whereupon a controversy arose between Plaintiff and the Minneapolis & St. Louis Railroad Company with respect to payment for facilities furnished by Plaintiff and services performed by Plaintiff in connection with such transfer of cars and traffic from and to the Minneapolis & St. Louis Railroad Company and other railroad companies operating in and near Peoria. After this controversy had been sometime in progress Plaintiff notified Minneapolis & St. Louis Railroad Company that beginning on the 15th day of July, 1921, Plaintiff would no longer handle cars from and to the Minneapolis & St. Louis Railroad Company and its connections at and near Peoria unless the Minneapolis & St. Louis Railroad Company would pay its proper proportion of the expense of making the transfer and a reasonable amount for the facilities used and the services performed by Plaintiff in making such transfer. The Minneapolis & St. Louis Railroad Company declined and refused to pay anything for such services and thereupon for a time Plaintiff refused to handle cars to and from the Minneapolis & St. Louis Railroad Company from and to its connections at Peoria. Following such refusal upon the part of the [fol. 12] Plaintiff, Minneapolis & St. Louis Railroad Company on the 20th day of August, 1921, filed a certain Bill of Complaint in

this Court against Plaintiff and certain other railroads operating in and near the vicinity of Peoria whereby it was sought to secure a mandatory injunction against the Plaintiff requiring it to perform this service without charge. Answer was filed on behalf of the Plaintiff and other railroad companies made parties Defendant to this proceeding and upon hearing the Bill was dismissed by this Court and the preliminary injunction denied. Reference is made to this proceeding and to the decree entered in that cause which was Equity Cause No. 140 on the Docket of this Court. The order dismissing the Bill in this case was as follows:

"Ordered and adjudged that the motion of the Complainant for a temporary injunction be and the same is denied and the said bill be and the same is hereby dismissed for want of jurisdiction and equity, to all of which Plaintiff by counsel excepts."

In the meantime and before the entry of the final decree, this controversy had been brought to the attention of the Interstate Commerce Commission, and particularly, to the attention of the Honorable Edgar E. Clark, at that time Chairman of the said Interstate Commerce Commission, who suggested to the parties, to-wit, Plaintiff and the Minneapolis & St. Louis Railroad Company, that if Plaintiff purposed to make a charge for facilities furnished and services rendered by it a tariff should be published with the Interstate Commerce Commission in accordance with the provisions of Section 6 of the Interstate Commerce Act covering such services. Thereupon the Interstate Commerce Commission granted to Plaintiff its special permission No. 54479, by the terms of which Plaintiff was permitted to file upon one day's notice its tariff I. C. C. No. 36, effective August 30, 1921, by the terms of which tariff there was imposed a charge of $4.00 a car for the intermediate switching services performed by Plaintiff and necessary to effect a transfer of cars between the Minneapolis & St. Louis Railroad Company and its connections at and near [fol. 13] Peoria which transfer was made at the established point of interchange, to-wit, East Peoria Yard, heretofore mentioned. Thereupon from and after August 30, 1921, continuously up to January 8, 1923, the Minneapolis & St. Louis Railroad has, pursuant to the terms of said tariff, paid $4.00 for each and every car transferred from the track connection of the said Minneapolis & St. Louis Railroad Company and Plaintiff to East Peoria Yard.

9. Following the dismissal of the said Bill of Complaint filed by the Minneapolis & St. Louis Railroad as aforesaid and the taking effect of the said tariff, I. C. C. No. 36, filed as aforesaid with the Interstate Commerce Commission, the Minneapolis & St. Louis Railroad Company filed its Complaint with the Interstate Commerce Commission under its docket No. 13110 against Plaintiff wherein it sought to have the said tariff, I. C. C. No. 36, abrogated, cancelled and set aside and to have the said Commission declare that Plaintiff herein, Defendant in the said proceeding, Docket 13110, should be declared to be without right or authority to make any charge for the said service covered by the said tariff. Answer was filed on behalf

of the Plaintiff, Defendant in the said proceeding 13110, testimony was taken, briefs and arguments had and thereafter the Interstate Commerce Commission on the 13th day of April, 1922, made its report and order in the said cause, copy of which report and order is herewith appended, marked Exhibit 3, and is asked to be taken as a part of this Bill of Complaint. By the terms of said report and order the Commission declined to cancel the said tariff, I. C. C. 36, and held that the Plaintiff herein had a right to make a reasonable charge against the Minneapolis & St. Louis Railroad Company for services performed in effecting the said transfer of traffic, but the Commission held that a similar charge should be made by Plaintiff against certain other railroad companies, operating in and through Peoria and that it was an unlawful discrimination for Plaintiff herein to impose a charge for services rendered and facilities fur- [fol. 14] nished to the Minneapolis & St. Louis Railroad Company without at the same time making a similar charge for services rendered and facilities furnished to the Chicago, Burlington & Quincy Railroad Company and the Chicago, Rock Island & Pacific Railway Company and the Peoria Railway Terminal Company, which last three mentioned railroad companies operate into and in the vicinity of Peoria. After the rendition of the said report and order of the Interstate Commerce Commission in Docket 13110 this Plaintiff, in order to remove the discrimination found by the Commission to exist in connection with the handling of traffic, filed its tariff, I. C. C. 40, imposing a switching charge upon the Chicago, Burlington & Quincy Railroad Company, the Chicago, Rock Island & Pacific Railway Company and the Peoria Railway Terminal Company in varying amounts named in said tariff. Upon the filing of this said tariff, I. C. C. 40, protest was made by the Chicago, Rock Island & Pacific Railway Company, Chicago, Burlington & Quincy Railroad Company and Peoria Railway Terminal Company and as a result of such protest the Interstate Commerce Commission, acting under authority conferred upon it in the Interstate Commerce Act, suspended the said tariff, I. C. C. 40, and entered upon a hearing as to [fol. 15] the propriety thereof. The Interstate Commerce Commission at the same time reopened the petition of the Minneapolis & St. Louis Railroad Company, Docket No. 13110, and consolidated that Complaint with the Investigation made necessary by the action of the Commission in suspending Plaintiff's tariff, I. C. C. No. 40. Thereupon a further hearing was had, briefs filed, arguments made and the Interstate Commerce Commission, as a result of this second hearing, entered its opinion and order bearing date of December 22, 1922. Copy of this opinion and order is herewith appended, marked Exhibit 4, and is asked to be made a part of this Bill of Complaint.

By this opinion and order the said Tariff, I. C. C. No. 40, was permanently suspended, the Complaint filed by the Minneapolis & St. Louis Railroad Company in Docket I. C. C. 13110 was dismissed and it was indicated by the Commission that a general investigation would be ordered by the Commission to inquire into all questions pertaining to the said above-described controversies.. Shortly thereafter, to-wit, on the 2d day of January, 1923, the Minneapolis & St,

Louis Railroad Company served upon the Plaintiff a notice which was in the following words and figures, to-wit: "In view of fact that order by Eye See See in I. and S. Docket Number Fifteen Ninety six orders cancellation of tariffs carrying charges against Burlington and Rock Island and in view of fact that thereby discrimination as between this road and Burlington and Rock Island found to exist in original report in case number thirteen thousand one hundred ten is continued this is to advise you that pending results of the general investigation in reference to practices, rates, and charges in connection with traffic moving from, through, to or within the Peoria Pekin District ordered by the Eye See See on its own motion the Minneapolis & St. Louis Railroad Company will refuse to make any further payments to your road under P. and P. U. Tariff Eye See See number thirty six or any other tariff on account of switching charges on through traffic interchanged at Peoria with tenant lines of your road."

By the terms of the said notice the Minneapolis & St. Louis Railroad Company declared its purpose from and after the 2d day of January, 1923, to refuse to pay the Plaintiff anything for services performed by Plaintiff and the facilities furnished by the Plaintiff for the benefit of the Minneapolis & St. Louis Railroad Company in the matter of the interchange of traffic as aforesaid and would refuse to pay the lawful tariff charge covered by tariff I. C. C. No. 36, which was then and is now lawfully on file with the Interstate Commerce [fol. 16] Commission and in full force and effect.

10. Upon receipt of this notice by which Plaintiff was informed by the Minneapolis & St. Louis Railroad Company that it, the Minneapolis & St. Louis Railroad Company would no longer pay anything for the services performed and would disregard and disobey the lawful tariff provision in effect covering these services, Plaintiff, as it had a right to do, informed the Minneapolis & St. Louis Railroad Company that it, the Plaintiff, would no longer handle traffic in interchange for the Minneapolis & St. Louis Railroad Company and would decline to perform any service or furnish any facilities for the said Minneapolis & St. Louis Railroad Company until the Minneapolis & St. Louis Railroad Company should agree to pay the tariff charge therefor. The Plaintiff assetrs that in giving this notice and in adopting this policy it acted entirely within its legal rights since neither by any provision of law nor by any lawful order of any regulating body nor otherwise is Plaintiff required to perform a service and to grant the use of its facilities without compensation. And particularly is this the case where there is on file a lawful tariff, authorizing the imposition of a fixed and definite charge to cover a particular service such as is here involved.

11. Plaintiff shows further that upon the receipt of notice from Plaintiff to the effect that it, Plaintiff, would no longer continue to perform service for the Minneapolis & St. Louis Railroad Company without compensation, the Minneapolis & St. Louis Railroad Company brought the matter in an informal way, as Plaintiff is advised

and believes, to the attention of the Interstate Commerce Commission. In any event, the President of Plaintiff on the 5th day of January, 1923, received a telegram from the Honorable Clyde B. Aitchison, a member of the Interstate Commerce Commission, which telegram requested Plaintiff not to take any action which would cause an interruption of traffic and which would prevent the receipt and delivery of carload freight in interchange by and from the Minneapolis & St. Louis Railroad Company. As a result of this telegram from the said Aitchison, Plaintiff for the time being continued to handle cars and to furnish facilities and perform services in the interchange of cars between the Minneapolis & St. Louis Railroad Company and its said connections at Peoria without collecting the tariff rate [fol. 17] therefor or any other amount, but this action on the part of Plaintiff is temporary and was taken only out of respect to the wishes of a member of the Interstate Commerce Commission and by reason of a strong desire on the part of Plaintiff not to inconvenience the public nor to interrupt the regular flow of traffic through Peoria.

12. Plaintiff shows further that after the lapse of some days during which there were certain conferences with certain members of the Interstate Commerce Commission when it became apparent that the Minneapolis & St. Louis Railroad Company would persist in its policy of demanding services and facilities at the hands of the Plaintiff without compensation Plaintiff on the 16th day of January 1923, served a final notice upon the Minneapolis & St Louis Railroad Company that on and after 12 o'clock noon of Saturday, January 20, 1923, it, the Plaintiff would thereafter refuse to handle any traffic in interchange for the account of the Minneapolis & St. Louis Railroad Company and would refuse any services or furnish any facilities for the said Minneapolis & St. Louis Railroad Company unless and until said Minneapolis & St. Louis Railroad Company would arrange or agree to pay regular tariff charge therefor.

13. Plaintiff shows that upon receipt of this notice, as Plaintiff is advised and believes, Minneapolis & St. Louis Railroad Company filed some sort of ex parte petition with the Interstate Commerce Commission of the exact character of which Plaintiff is uninformed. No copy of this petition was furnished to the Plaintiff and no hearing has been granted by the Interstate Commerce Commission to Plaintiff in connection with any such Complaint, petition or other document so that Plaintiff is not in a position to state what character of representation was made by the Minneapolis & St. Louis Railroad Company to the Interstate Commerce Commission. Plaintiff does charge, however, that whatever complaint was filed and whatever hearing was had with reference thereto was entirely ex parte and the Plaintiff has had no opportunity to reply to any such complaint nor to be heard on same by and before the Interstate Commerce Com- [fol. 18] mission or any Division thereof.

14. Plaintiff further shows that on the 18th day of January, 1923, one of the Divisions of the Interstate Commerce Commission, to-wit,

Division 5, made and entered its certain service order No. 37, heretofore referred to and heretofore made Exhibit 1 to this Complaint. By the terms of this order Plaintiff is required without compensation to handle traffic between the Minneapolis & St. Louis Railroad Company and connecting carriers at Peoria in violation of the terms of said tariff, I. C. C. No. 36, which tariff is still in effect and in violation of the constitutional rights of the Plaintiff to demand and receive compensation for facilities furnished and services rendered to theMinneapolis & St. Louis Railroad Company.

15. Plaintiff shows that the said pretended service order entered by the Interstate Commerce Commission in the manner above described is null and void and of no effect in law for the reason that neither the Interstate Commerce Commission nor any Division thereof has any authority under the law to enter an order of this kind under any circumstances. Plaintiff shows while the order is called a service order and purports to be issued by the Interstate Commerce Commission under the emergency powers vested in the Interstate Commerce Commission by the terms of the Interstate Commerce Act yet nowhere in the said Act or in any other act of Congress is the Interstate Commerce Commission given authority in emergency or otherwise to make an order of this kind. Plaintiff avers, therefore, that the order is ultra vires and is consequently null and void and one which the Interstate Commerce Commission has no power to make.

16. Plaintiff shows further that there are severe penalties provided for in the Interstate Commerce Act for a violation of any order of the Interstate Commerce Commission and particularly is it provided in said Act that any carrier who violates any service order of the Commission made in emergency or otherwise shall be liable to a penalty of not less than One Hundred Dollars nor more than five hundred Dollars for each such offense and fifty Dollars for each and every day for the continuance of such offense, which penalties shall [fol. 19] accrue to the United States and be recovered in a civil action brought by the United States. Plaintiff shows further that there are other penal provisions of the Interstate Commerce Act for disobeying any order of the Interstate Commerce Commission.

17. Plaintiff shows that prior to the issuance of said pretended service order No. 37, the Interstate Commerce Commission entered its order in a proceeding entitled No. 14534, which order was entered on January 8, 1923, and which was supplemental to the said decision of the Commission rendered as aforesaid on December 22, 1922. A copy of this said order of the Interstate Commerce Commission in No. 14534 is hereto appended, marked Exhibit 5, and is asked to be taken as a part of this Bill of Complaint. By the terms of this order a general investigation is undertaken by the Interstate Commerce Commission into the lawfulness of rates, charges, regulations and practices of Plaintiff and other railroads with which it connects at and in the vicinity of Peoria, as well as an investigation into divisions and other questions involved in the controversy heretofore described.

18. Plaintiff shows further that the said Service Order 37 of the Interstate Commerce Commission infringes upon the constitutional rights of the Plaintiff in that it directs Plaintiff to perform an uncompensated service and to continue to perform work for the Minneapolis & St. Louis Railroad Company and furnish facilities to that company without compensation which has the effect of depriving Plaintiff of its property without due process of law and taking Plaintiff's private property for public use without just compensation, contrary to the Fifth Amendment to the Constitution of the United States.

19. Plaintiff shows that unless said Service order No. 37 of the Interstate Commerce Commission is enjoined, cancelled and set aside by the decree of this Court Plaintiff will be forced to obey an illegal order of the Interstate Commerce Commission entered without authority of law and in violation of the Constitution of United States or be subjected to suits for enormous penalties and numerous prose-
[fol. 20] cutions which will be instituted by the United States against Plaintiff for violations of the alleged order, all of which suits and prosecutions will grow out of the same subject-matter and be identical in character with the same parties, both Plaintiff and defendant, thereby subjecting Plaintiff to a multiplicity of suits against which a Court of Equity should grant Plaintiff relief.

The premises considered and because Plaintiff has no adequate remedy at law, Plaintiff prays, therefore, that this Bill of Complaint be received and filed, that a writ of subpœna be issued by the Clerk of this Court, as provided by law, commanding the United States of America to appear and defend this action, that notice hereof be given to the Attorney General of United States and to the Interstate Commerce Commission and that upon the filing of this Bill the Judge of this Court call to his assistance two other judges, one of whom shall be a Circuit Judge, and that upon five days' notice of the time and place of hearing having been given to the Attorney General and the Interstate Commerce Commission that Plaintiff be granted a temporary injunction restraining the Interstate Commerce Commission and the United States from enforcing the terms of the said Service Order 37 and that upon final hearing of this cause a decree be entered adjudging the said Service Order to be in all respects null and void and ordering the same to be abrogated, cancelled and set aside, and permanently enjoining the Interstate Commerce Commission and the United States of America from taking any steps to enforce the said order or from bringing any suits against the Plaintiff for penalties. And Plaintiff in duty bound will ever pray, etc.

Peoria & Pekin Union Railway Company, By V. V. Boatner, Its President. Miller, Elliott & Westervelt, R. V. Fletcher, Counsel.

[fol. 21] STATE OF ILLINOIS,
County of Peoria, ss:

This day personally appeared before me the undersigned authority of the said County and State, V. V. Boatner, personally

known to me, he being by me first duly sworn on oath says that he is President of the Peoria & Pekin Union Railway Company, that he has read the above and foregoing Bill of Complaint and that the avertments therein made, so far as they purport to be of his own knowledge are true as stated and those made on information and belief he believes to be true.

Subscribed and sworn to before me this 24th day of Jan. A. D. 1923. Ethel I. Hardine, Notary Public. [Seal.]

[fol. 22] EXHIBIT NO. 1 TO BILL OF COMPLAINT

Service Order No. 37

At a Session of the Interstate Commerce Commission, Division 5, Held at Its Office, in Washington, D. C., on the 18th Day of January, A. D. 1923

The subject of routing freight traffic being under consideration, and it appearing that a controversy exists between the Minneapolis and St. Louis Railroad Company and the Peoria and Pekin Union Railway Company over the terms under which the said Peoria & Pekin Union Railway shall interchange freight traffic between the Minneapolis & St. Louis Railroad Company and connecting carriers at and in the vicinity of Peoria, Ill., which has been brought to the attention of the Commission by formal complaint filed by said Minneapolis & St. Louis Railroad under No. 13110;

And it further appearing that on the 8th day of January, 1923, the commission by order under No. 14534 entered upon a general investigation into and concerning the lawfulness of the rates, regulations and practices of the Peoria and Pekin Union Railway Company and railroads with which it connects at and in the vicinity of Peoria, Ill.;

And it further appearing that the complaint of said Minneapolis & St. Louis Railroad Company under No. 13110 has been reopened and consolidated with said general investigation under No. 14534;

And it further appearing that a petition has been filed with the commission by the said Minneapolis & St. Louis Railroad Company from which it appears that the Peoria and Pekin Union Railway Company has indicated to it that unless certain claimed payments are made for certain claimed services performed by the said Peoria & Pekin Union Railway, it will refuse to interchange freight traffic between said Minneapolis & St. Louis Railroad and its connections at and in the vicinity of Peoria, Ill.;

And it further appearing by said petition that the said Minneapolis & St. Louis Railroad Company is not now paying and is unwilling to pay any charges for the claimed service performed by the said Peoria & Pekin Union Railway pending determination by this Commission of the controversy hereinbefore referred to;

And it further appearing that subsequent notice has been given to this Commission and to the Minneapolis & St. Louis Railroad Company that unless such claimed payments are made promptly, it will discontinue to interchange freight traffic between the said Minneapolis & St. Louis Railroad and connecting carriers at and in the vicinity of Peoria, Ill., on and after 12 M. January 20, 1923;

And it further appearing that by reason of said notice of refusal of the Peoria & Pekin Union to interchange such traffic between said Minneapolis & St. Louis Railroad and connecting carriers, whether such traffic moves under joint or combination rates, and by reason of the refusal of the Minneapolis & St. Louis Railroad to pay any charges for the claimed services performed by the Peoria & Pekin Union Railway in interchange of such traffic, an emergency is thereby created which requires immediate action of the Commission.

Therefore, in order best to promote the service in the interest of the public and the commerce of the people, and in order that the constant flow of Interstate commerce may not be interfered with, it is ordered and directed, effective forthwith and until the further order of the commission in the premises:

1. That the Peoria & Pekin Union Railway Company shall with reasonable promptness and diligence continue to interchange freight traffic between the Minneapolis & St. Louis Railroad Company and connecting carriers at the regularly established interchange points at and in the vicinity of Peoria, Ill.

[fol. 23] 2. That copies of this order be served upon the Peoria & Pekin Union Railway Company, Peoria Railway Terminal Company and W. G. Bierd and H. I. Battles, Receivers, The Minneapolis & St. Louis Railroad Company, The Chicago, Burlington & Quincy Railroad Company, the Chicago, Rock Island & Pacific Railway Company, the Chicago & Alton Railroad Company and William W. Wheelock and William G. Bierd, Receivers, Toledo, Peoria & Western Railway Company and S. M. Russell, Receiver, Illinois Central Railroad Company, the Atchison, Topeka & Santa Fe Railway Company, the Lake Erie & Western Railroad Company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Chicago, Peoria & St. Louis Railroad Company and Bluford Wilson and William Cotter, Receivers, Chicago & Northwestern Railway Company, the Pittsburg, Cincinnati, Chicago & St. Louis Railroad Company, and St. Louis, Springfield & Peoria Railroad, and that notice of this order be given to the general public by depositing a copy hereof in the office of the Secretary of the Commission at Washington, D. C.

By the Commission, division 5:

George B. McGinity, Secretary. (Seal.)

ol. 24] Exhibit No. 2 to Bill of Complaint

ntract Between the Peoria and Pekin Union Railway Company and the Proprietary Lines

ol. 25] Contract Between the Peoria & Pekin Union Railway Company and the Proprietary Lines

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27] Contract Between the Peoria and Pekin Union Railway Company and the Proprietary Lines

Original Parties to Contract

s Indenture, made this 1st day of February, Anno Domini ousand eight hundred and eighty-one, between the Peoria and

Pekin Union Railway Company, a corporation under the laws of the State of Illinois, party of the first part, and the Indiana, Bloomington and Western Railway Company, party of the second part, the Wabash, St. Louis and Pacific Railway Company, party of the third part, the Peoria and Jacksonville Railway Company, party of the fourth part, and the Peoria, Decatur and Evansville Railway Company, party of the fifth part, each for itself and not for the others.

Witnesseth: That, whereas, the said four last named railway companies, for the more convenient and economical transaction of their business and the better accommodation of the public, desire to extend and improve their facilities in the City of Peoria, in the State of Illinois, and to that end have caused to be organized and incorporated under the laws of the said State of Illinois, the said Peoria and Pekin Union Railway Company, party of the first part hereto, the capital stock of which is to be taken, held and owned by the said four constituent companies, as hereinafter mentioned; and

Whereas, The said party of the first part, for the purposes of its organization and the uses hereinafter set forth, hath acquired:

P. and P. U. Acquirements

First. The absolute ownership of that part of the line of railroad in the State of Illinois, now or lately known as the Peoria, Pekin and Jacksonville Railroad, commencing at a point on the main track of the said railroad in the City of Pekin, Illinois, known as and includ-
[fol. 28] ing the Junction Switch north of the Union Depot in said City of Pekin; thence northwardly and westwardly to the terminus of said railroad, in the City of Peoria, Illinois, including all main tracks, side tracks, turn outs, switches, right of way, road bed, superstructure, bridges, depots and depot grounds, turn tables, round houses, stock yards, buildings, real estate, leasehold rights and terminal facilities in the said City of Peoria, and all the appurtenances to the said part of the said railway between the said place of beginning and the terminus of the said railroad in the City of Peoria.

Second. The exclusive use and enjoyment of the line of railroad in Illinois, now known as the Peoria and Springfield Railroad, as the same is now located and constructed between the said cities of Pekin and Peoria, with all the property, equipment, terminal facilities and appurtenances of said railroad between the said cities, and in either or both thereof.

Third. The exclusive use and enjoyment of the main tracks, side tracks, turn outs, switches, terminal facilities, and appurtenances within the said City of Peoria, lately of that line of railroad in Illinois known as the Toledo, Peoria and Western Railway, more specifically mentioned and described in a certain contract bearing date the 13th day of January, A. D. 1881, between the Wabash, St. Louis and Pacific Railway Company, the lessee of the said Toledo, Peoria and Western Railway Company, of the one part, and the said Peoria and Pekin Union Railway Company, of the other part.

Duties of P. and P. U.

Now, Therefore, this indenture witnesseth, that the said party of the first part, in consideration of the premises, of the rents, tolls and dues hereinafter reserved, and of the covenants and agreements of the said lessees respectively hereinafter contained, hath covenanted and agreed, and by these presents doth covenant and agree, to and with the said parties of the second, third, fourth and fifth parts respectively, and their successors and assigns, as follows, that is to say:

[fol. 29] First. That it will from time to time procure the execution and delivery of such leases, contracts and conveyances, and such extensions thereof, and of its corporate franchises under the laws of the State of Illinois as shall fully vest in it the right, power and authority to maintain and defend the said lessees hereinbefore named and their successors in the use and enjoyment of the estate, rights and privileges hereby demised and granted, so long as this contract shall remain in force between the said parties thereto.

Second. That it will from time to time keep up and maintain all its said main tracks, side tracks, switches, connections and terminal facilities in the cities of Peoria and Pekin in good working order and condition,and will, from time to time, acquire such additional terminal facilities and make such additions to the present tracks, side tracks and switches as shall or may be necessary to the prompt and efficient performance of its covenants herein contained, and of the service by it to be performed under this contract.

Third. That it will, within a reasonable time hereafter, and upon grounds to be acquired by it, construct, furnish and equip, and thereafter maintain as Union passenger depot in the said City of Peoria, with the necessary tracks for access thereto, and will provide the said passenger depot with all the usual supplies, furniture and appendages for the convenient use thereof; that it will warm and light the same, and keep and maintain it in good repair and condition, and provide a reasonable number of ticket, baggage and other agents and employes to conduct and manage the business incident thereto; and that until the completion of the said Union passenger depot, it will provide and furnish suitable and sufficient standing room and other accommodations for the passenger trains of the said several lessees at the said City of Peoria.

Fourth. That it will provide and maintain all such engines, tenders and other rolling stock, machinery, appliances, turn-tables, buildings and other structures, and all such mechanics, workmen and employes as shall be reasonably necessary for the conduct of the [fol. 30] business, and rendering the services herein required to be done, and rendered.

Fifth. That it will provide suitable and sufficient round house accommodation at the City of Peoria, where the said lessees and each

of them and their employes can shelter and care for their locomotive engines engaged in their traffic to and from the City of Peoria; and will keep up and maintain the same during the continuance of this contract in good serviceable condition, and will provide suitable and convenient turn-tables for turning the engines and cars of the said lessees, and maintain the same in serviceable condition.

Sixth. That it will provide and furnish, in the said City of Peoria, suitable and convenient freight house or houses for the handling of freight, from and to the cars of said lessees, and sufficient laborers for the prompt loading and unloading thereof; and that it will furnish such convenient standing room as shall be necessary for the loading and unloading of freight cars of the lessees on the track from and to wagons or drays.

And this indenture further witnesseth, that the said party of the first part hath let, leased and demised, and by these presents doth let lease and demise unto the said parties of the second, third, fourth and fifth parts respectively, their successors and assigns, all and singular its said main tracks, side tracks, switches, turnouts, connecting tracks, round houses, freight houses, passenger depots and all its terminal facilities in the said Cities of Peoria and Pekin, whether the said described premises are now owned or held by said first party or shall be hereafter acquired.

Rights of Lessees

To have and to hold, under the terms, provisions, stipulations, limitations and conditions, for the use and enjoyment thereof herein contained, unto the said parties of the second, third, fourth and fifth parts respectively, and their successors and assigns, severally and equally, as tenants in common, for and during the full term and period of fifty years from and after the 1st day of February, A. D. 1881, and renewable from time to time for like periods forever, on [fol. 31] the same terms, provisions, stipulations, limitations and conditions, subject to the earlier determination of this lease as hereinafter provided, but not exclusively, however, the said party of the first part hereby expressly reserving unto itself the full right and power to make contracts for the use and enjoyment of said demised premises by other railroad companies doing business at the said City of Peoria or desiring to do so; the said lessees to take, use, occupy and enjoy said demised premises in the manner following, and not otherwise; that is to say:

First. The said lessees shall severally have the right to the common use and enjoyment of all the main tracks aforesaid of the said party of the first part between their terminal in the said Cities of Pekin and Peoria, and the necessary sidetracks for passing trains, in running their trains of every class over the same or any part thereof, with their own engines and employes, between Pekin and Peoria, and for the purpose of delivering and receiving their trains and cars to and from the party of the first part, and to and from the said Union Passenger Depot.

Second. The said lessees shall severally have the right to use the said round house or houses, together with the necessary approaches thereto for the care and shelter of their engines, and to use said turntables for the purpose of turning their engines and cars.

Third. The said lessees shall severally have the right to the use of the said freight house or houses, and of the proper tracks connecting therewith, for the purpose of loading and unloading freight, and also the use of the standing room provided for the loading and unloading of cars from or to wagons and drays, the first party to furnish the necessary labor therefor.

Fourth. The said lessees shall severally have the right to the use of all the transfer tracks, side tracks, switches, and turnouts and other terminal facilities of the first party at the said Cities of Peoria and Pekin, for the transfer of loaded and empty freight and other [fol. 32] cars by the said first party from and to all freight houses, warehouses, packing houses, stock yards, grain elevators, distilleries, mills and other industries, and to and from the tracks and warehouses of other railroads, with any of which any of the tracks of the first party shall at any time be connected, whether such tracks, or any of them, shall be owned or held or in some otherwise controlled by said first party; and the said party of the first part, for the considerations aforesaid, doth hereby covenant and agree, promptly and efficiently and without discrimination or partiality in favor of any company or the business thereof, to make such transfers of the loaded and empty freight and other cars of the said lessees respectively, the said first party hereby reserving unto itself the right to make transfers for all companies and persons desiring such services, without prejudice, however, to the business of the said several lessees, and said first party shall also make up and deliver on the main track all freight trains, and at the Union Passenger Depot all passenger trains of the said lessees respectively.

Fifth. The said lessees shall severally have the right to the use of the said Union Passenger Depot, when the same shall be constructed and the appurtenances and approaches thereto, and to run their passenger trains into and out of the said depot. But, until the completion of the said Union Passenger depot, the said lessees shall severally have the use of convenient and suitable accommodations for their passenger trains to be furnished by the said first party, and they shall at all times have the use of sufficient, convenient and suitable standing room for their passenger, baggage and mail cars at said City of Peoria while not in use on tracks to be provided and set apart by said first party.

Sixth. The said lessees shall severally have equal rights and accommodations in the use and enjoyment of all elevators, stock yards and other property and facilities at any time acquired or controlled by said party of the first part.

[fol. 33] Rents, Tolls, etc.

The said party of the first part reserving, however, unto itself, its successors and assigns the rents, tolls, incomes and payments hereinafter provided to be paid by the said several lessees respectively.

And in consideration of the premises and of the covenants herein contained, to be performed by the said party of the first part, the said lessees respectively do hereby covenant and agree, each for itself and its successors, and not one for the other, that during the continuance of this contract it will pay unto the said party of the first part and its successors as rental for the said demised premises and for the use and enjoyment thereof as herein provided for, in the manner following, that is to say:

Rental Installments

First. The sum of twenty-two thousand five hundred dollars per annum, to be paid in equal monthly installments, during the continuance of this contract, the installment of each month to become due and payable on the fifteenth day of the succeeding month, and to be paid at the place where the quarterly installments of interest on the first mortgage bonds of the party of the first part shall be payable, and when so paid the same shall be held for the payment of the next accruing interest on said bonds, and to be so paid out and not otherwise.

Joint-Maint. Expense

Second. The said lessees shall also severally pay to the Treasurer of the said party of the first part, at the said City of Peoria, on the fifteenth day of the succeeding month, or within ten days after a statement thereof shall be furnished by the said first party, their just proportion of the expenses incurred or paid during the preceding month by the party of the first part, for the maintenance, renewal and keeping in thorough repair and working condition the said main track and sidings, passenger depot, approaches and facilities, freight and round house or houses and all other property which shall be used by the said lessees in common with the said party of the first part, and of such other proper joint expenses and charges as shall accrue from the common use of said main tracks, depots, [fol. 34] freight and round houses and other property used in common, such just proportion to be fixed and determined by the number of wheels used and run by the said parties respectively on said main tracks, the said moneys to be paid by the lessees respectively to bear the same proportion to the whole amount of said expenses so to be incurred which the number of wheels used and run by the lessees respectively on the said main tracks shall bear to the whole number of wheels used and run on the said main tracks for the preceding calendar month; Provided, however, that it is expressly understood that the expense of maintenance, renewal and repair of all tracks lying within the yards of the first party at and near

Peoria and Pekin shall be borne and defrayed by the said first party at its own cost. [Foregoing paragraph amended March 14, 1911, as follows:]

Joint Maint. Expense As Amended

Second. The said lessees shall also severally pay to the Treasurer of the party of the first part at said City of Peoria, on the 15th day of the succeeding month, or within ten days after a statement thereof shall be furnished to said several lessees, their just proportion of the expenses incurred or paid during the preceding month by the party of the first part for the maintenance, renewal and keeping in thorough repair and working condition the main tracks, passenger depot, approaches and facilities, freight and round house or houses and all other property which shall be used by the said lessees in common with the said party of the first part, and of such other proper joint expenses and charges as shall accrue from the common use of said main tracks, depots, freight and round houses and other property used in common; and for the purpose of equitably apportioning the expenses among the various roads and companies using the same, the entire main tracks and passing tracks of said party of the first part shall be divided into nine (9) districts, to be known and designated by their respective numbers, and being as follows, viz:

[fol. 35] The District between the C. P. & St. L. junction and Big Four junction shall be known as District No. 1.

The District between the Big Four junction and the C. & A. junction shall be known as District No. 2.

The District between the C. & A. junction and Wesley junction shall be known as District No. 3.

The District between Wesley junction and Bridge junction shall be known as District No. 4.

The District between Bridge junction and C. & N. W. junction shall be known as District No. 5.

The District between C. & N. W. junction and Iowa junction shall be known as District No. 6.

The District between Iowa junction and Hollis junction shall be known as District No. 7.

The District between Bridge junction and the Union Station shall be known as District No. 8.

The District between Union Station and the T. P. & W. bridge shall be known as District No. 9.

a. Each lessee, except as otherwise provided, shall pay such part of the said expenses incurred or paid for or in each said district as is represented by the proportion between the total mileage of cars used and run by such lessees on the said main tracks in said district and the total mileage of cars used and run on said main tracks therein for such month. It is understood that in computing such car mileage, an engine and tender shall be treated as one car; and also that cars switched by the Union Company shall not be included.

b. And the just proportion of the expenses of the Union Depot incurred or paid during the preceding month by the party of the first part, as herein provided, shall be fixed and determined by the number of passenger train cars running into and out of said passenger depot, it being understood that an engine and tender shall be treated as one car; the said moneys so to be paid by the respective lessees to bear the same proportion to the whole amount of said expenses so to be incurred which the number of such cars run into and out of said Union Depot by said lessees respectively, shall bear to [fol. 36] the total number of such cars running into and out of said passenger depot for the preceding calendar month.

c. And the just proportion of the expenses, etc., of the freight houses as herein provided, shall be fixed and determined by the total tons handled for said respective lessees; the said amount to be paid by the respective lessees to bear the same proportion to the total amount of expenses so to be incurred which the total tons of each of said several lessees shall bear to the total tons handled in said freight houses for the preceding calendar month.

d. And the just proportion of the expenses of the round houses as herein provided, shall be fixed and determined by the number of engines housed by the several lessees respectively in the round houses of the party of the first part; all engines shall be considered housed which are placed upon the turntable of the round house; the said amount to be paid by said lessees respectively to bear the same proportion to the whole amount of said expenses so to be incurred or paid, which the total number of engines so housed by the said lessees respectively shall bear to the whole or total number of engines housed during the preceding calendar month.

e. The just proportion of the expenses, etc., as herein provided of the despatching of trains incurred or paid during the preceding month by the party of the first part as herein provided, shall be fixed and determined by the number of trains running over any of the said districts; the said moneys so to be paid by the respective lessees to bear the same proportion to the whole amount of said expenses so to be incurred or paid which the number of trains, passenger and freight, running over any of the said districts by the said lessees respectively shall bear to the total number of all trains run over any of said districts for the preceding calendar month.

f. And the just proportion of the expenses to be incurred or paid by the party of the first part in connection with or for any other property now or hereafter to be used in common, as herein provided or contemplated, shall be fixed and determined by the use of the [fol. 37] said respective lessees; said moneys to be paid to bear the same proportion to the whole amount of said expenses so to be incurred or paid which the use of such property by said several lessees shall bear to the total use thereof during the preceding calendar month.

Provided, however, that it is expressly understood that the expense of maintenance, renewal and repair of all tracks of the party

of the first part, except its main tracks and passing tracks, shall be borne and defrayed solely by the party of the first part.

Provided, further, that if at any time in the future any new connection or connections with such main tracks or sidings shall be made at any point or points between any of the several points representing a district as herein defined, then such district or districts wherein such new connection may be made, shall be subdivided and appropriately designated or named, and made into new districts or, if deemed advisable, the whole of said tracks may be re-districted; and the expense of maintenance of such new or additional districts, as herein contemplated, shall be borne and paid by the several roads using the same upon the basis herein provided; to the end that any new railroad, or railroad now using the facilities of the Peoria & Pekin Union Railway Company, making a connection hereafter, and using the same, shall bear and pay its or their just and proportionate share of the total joint maintenance expenses of the respective portion or portions of the facilities of the Peoria & Pekin Union Railway Company used by them, and as herein contemplated.

And Provided, further, that the foregoing amendment shall stand as a substitute and in lieu of that portion of said contract between the Peoria & Pekin Union Railway Company and its lessees only as far as it relates to the total joint maintenance expenses as herein provided, without prejudice to any other parts or portions of said contract, and that as to all other parts or portions of said contract the same shall remain and be in full force and effect.

[fol. 38] Pass., Mail and Baggage Cars

Third. After the completion of said Union Passenger Depot, the said lessees shall also severally pay at the time and in the manner last aforesaid or within ten days after a statement thereof shall be furnished by said first party, such reasonable sum for each of their passenger, mail and baggage cars entering or leaving said passenger depot during the preceding calendar month as shall be fixed by said first party, being an uniform rate per car to be charged to all companies which shall run their passenger trains to and from the said depot without discrimination, which shall include the charges for making up trains.

Thro. and Local Frt. Cars

Fourth. The said lessees shall also severally pay at the time and in the manner last aforesaid, or within ten days after a statement thereof shall be furnished by the party of the first part, all such reasonable charges as shall be made by the party of the first part for the preceding calendar month for the transfer service hereinbefore required to be done to and from connecting railroads, being an uniform rate per car which shall have been previously fixed by said party of the first part to be charged to all companies for such service without discrimination and which shall approximate the actual cost of such service as nearly as practicable, which shall include the charges for making up trains.

Industry Switching

Fifth. The said lessees shall also severally pay at the time and in the manner last aforesaid or within ten days after a statement thereof shall be furnished by the party of the first part, all such reasonable charges as shall be made by the party of the first part for the preceding calendar month for handling and switching their loaded and empty cars to and from freight houses, warehouses, packing houses, stock yards, grain elevators, distilleries, mills and other industries at the Cities of Pekin and Peoria, being an uniform rate per car which shall have been previously fixed by the said party of the first part, to be charged to all companies and persons for such service without discrimination, which shall include the charges for making up trains.

[fol. 39] And for the consideration aforesaid, and to the end that the business of the said parties hereto be conducted with the greatest economy and promptness, the said parties hereto do hereby covenant to and with each other, each for itself and not one for the other, as follows, that is to say:

Must Run all Pass. Trains in and Out of Union Station. All Frt. Cars Must be Del'd to P. and P. U. for Service

First. That each of said lessees and their successors shall and will at and upon the completion of the said Union Passenger Depot in the City of Peoria, ready for use, use and occupy the same thenceforward during the continuance of this contract, as and for its passenger depot at the City of Peoria, and run into the said passenger depot all its regular passenger trains coming into the said City of Peoria, and run all its regular passenger trains going out of or leaving said city from the said passenger depot, and from and to no other depot in Peoria. And that all of the loaded and empty freight cars of the said lessees respectively coming into and going out of the said City of Peoria, whether the same be for transfer to or from the said main tracks and to or from other railroads, or consigned to or from any of the industries in the City of Peoria before mentioned, shall be delivered to the said party of the first part, to be transferred, switched or handled by it for such lessee, and that all of the freight or passenger trains of the said lessees respectively moving to or from Peoria shall pass over the track of said first party.

Must Not Discriminate

Second. Neither the party of the first part, nor any of its managers, agents or employes shall, in the conduct of the said business, in any manner discriminate in favor of any company in respect to the use of its said main tracks, side tracks and switches, depots, freight houses, and other property, or in respect to the handling, switching or transferring of any cars as herein provided for, and that each of the said lessees shall in all respects have equal facilities and ac-

commodations with any and all other companies now or hereafter having the right to the use and enjoyment of the said premises, and the performance of the services herein provided for, and the business of each of the said lessees shall at all times receive the like care, at-
[fol. 40] tention and accommodation from the party of the first part, its officers and agents, and shall be amenable to like control and treatment.

Rules

Third. That the said party of the first shall make and establish all such reasonable rules and regulations consistent with the provisions hereof as shall be necessary for the operation and movement of trains and cars upon and over all of its said tracks, and the use of said Union passenger depot, freight and round houses and the other property and privileges hereby granted; but such rules and regulations shall be general in their character and operation, and shall be complied with by, and enforced against, all persons and companies having the use of said tracks, without discrimination.

General Control Vested in P. and P. U.

Fourth. That the party of the first part shall have the general management, control and supervision of said main tracks, Union passenger depot and its approaches, depot grounds and all other property of the party of the first part which may be used by the said lessees, and the full and sole control and direction of the management, use, location, improvement and repair of the same and the appointment and supervision of all officers, agents and employes necessary for such purposes. Nothing herein contained shall prevent the party of the first part from assigning for the use of each of the said lessees a particular track or tracks upon the main line or in said Union passenger depot or its approaches, or from changing such assignment as the traffic and business over the road may from time to time require, or to prevent the party of the first part from shifting, relaying, changing or extending its tracks or road-bed, or making such improvements or additions to the same as may become requisite and necessary, provided the said party of the first part shall always keep up and maintain its main tracks to their present termini.

Time Tables. Rules

Fifth. That each of the said parties hereto shall have the right to arrange its own time tables, but this right shall be so exercised as not to cause unnecessary inconvenience to the other parties hereto. Should a dispute arise between the said parties, or any of them, as
[fol. 41] to the arrangement of trains, or to the use of the tracks, or the Union passenger depot and its approaches, or use of said freight and round houses, the party of the first expressly reserves the right and power to determine, establish, and enforce the arrangement of trains and time tables, the use of the depot and its approaches and other property used in common; and if necessary for the safe

and proper conduct of the traffic over the tracks of the party of the first part, it shall have the power to prescribe and regulate the rate of speed and the movement of trains; provided, however, that the trains and business of the same class of the lessees, severally, shall at all times have preference and precedence in the use of the said main tracks, switches and turnouts over the like trains and business of other companies subsequently acquiring the right to use said tracks; and, provided further, that all trains of the said parties hereto shall have preference and precedence over all inferior trains of all roads or companies and of each other.

Local Frt. and Pass. Business

Sixth. That neither the said party of the first part, nor any of its officers, agents or employes, shall at any time, or on any pretense whatever, regulate, control or otherwise interfere with the divisions of passenger or freight traffic over any of the railroads entering or leaving any point on the lines of the said party of the first part; nor shall they nor any of them in any way influence or control business, or seek or attempt to influence or interfere with said business, by giving information concerning the same, or otherwise, in favor of or against any company or person; and that each of said lessees shall at all times be free to make its own rates for the transportation of freight or passengers, without any interference or restraint from or by said party of the first part, its officers, agents or employes, or any of them; but the said party of the first part hereby reserves to itself the entire local freight and passenger business between the City of Peoria and the City of Pekin, and intermediate points or stations between the two places; none of the said lessees shall participate therein, except upon such terms as shall be extended [fol. 42] to all the roads having the right to use said main track, and upon a schedule of rates therefor to be prescribed by said party of the first part, and to be observed by all companies; and should the said lessees, or any of them, fail to comply with such schedule, either by rebates or otherwise, such lessee may be altogether excluded from participating in such local traffic. And the said several lessees hereby further covenant and agree, that they will account for, and pay over monthly, at the time and place of other monthly payments, to the said party of the first part, all sums collected by them for or on account of said local freight or passenger traffic in excess of the fair cost of such service.

P. and P. U. Must Keep Car Records

Seventh. That the said party of the first part shall keep a faithful and true record of all the freight and passenger cars handled by it for each of the said lessees, which shall at all times be open for the inspection of said lessees, and their agents, duly appointed for that purpose, and shall furnish statements thereof, from time to time, when requested by either of said lessees, and that each of said lessees shall keep a faithful and true record of all the cars which it shall

move over any of the tracks of the party of the first part, and which shall not be handled by it, the said first party, and make such reports thereof, from time to time, as shall be required by said first party, which said records shall at all times be open to the inspection of said first party and its agents duly appointed for that purpose.

Other Roads—Terms of Entry

Eighth. Any other railroad company whose road shall now, or hereafter run into the City of Peoria, or that shall desire to procure an entrance into the said city, shall be allowed to acquire the same rights and privileges as the said several lessees, but no other, and upon no less rental upon entering into a like contract hereto with the party of the first part, except as to representation in the Board of Directors of the party of the first part, and ownership in its capital stock.

Damage Suits, etc.

Ninth. That each of said lessees respectively, each for itself and not for the other, will forever save, indemnify and keep harmless [fol. 43] the said party of the first part from all suits, actions, costs and damages arising from or by reason of its acts, negligence or failure in duty, or of any of its officers, agents or employes, and will at its own proper cost and expense defend all actions and suits, whether at law or in equity, which may be brought against said party of the first part, for or on account of the acts, negligence or failure of duty of such lessee or of any of its officers, agents or employes, and will well and truly pay, or cause to be paid, all such sums as shall be recovered therein against the party of the first part, and that the said party of the first part will forever save, indemnify and keep harmless the said lessees, and each of them and their successors, from all suits, actions, costs and damages arising from or by reason of its acts, negligences or failure of duty, or of any of its officers, agents or employes, and will at its own proper cost and expense defend all actions and suits, whether at law or in equity which may be brought against either of said lessees for or on account of such negligence or failure in duty, and will well and truly pay, or cause to be paid, all such sums as shall be recovered in such suit against said lessees or either of them.

Lessees Shall Not Sublet Rights

Tenth. Neither the said lessees nor any of them shall sell, assign, transfer or underlet the rights and privileges hereby granted, or any of them, without the consent of the said party of the first part, expressed by a resolution of its Board of Directors, approved by all the members of said board; nor shall they or either of them have the right by any contract with any other railroad corporation, or the owner or owners of any railroad, to give to such corporation or owner the right for its trains to pass over or use the railroad of the party of the first part; provided that any purchaser of the property

of either of said lessees under any sale thereof made by virtue of any mortgage or deed of trust, or at any judicial sale thereof, may at his option by such sale acquire the rights of such lessee and be subject to and bound by all the convenants and provisions hereof; and, provided further, that if any one of said lessees shall consolidate its stock, property and franchise with those of any other corporation, [fol. 44] then the corporation or company formed by such consolidation shall have all the rights and privileges of such lessee under this contract; and provided further, that if any of the said lessees shall at any time desire to extend its road it shall have the right to connect the tracks of said extension with the main tracks of said party of the first part; and provided further, that the rights and obligations of the several parties to this contract shall be in no wise affected by any lease, consolidation or merger of any two or more of said parties, but that each of the parties hereto shall have the right to demand, in case of such merger, the full performance of the obligations of this contract by each of the parties thereto, to such extent that no additional burden shall result to any of the others from such lease, consolidation or merger.

Appointment of Operating Officers Subject to Approval of Tenants

Eleventh. The General Manager, Superintendent or other officer charged with the operation and care of the property hereby demised and leased, shall be nominated by the party of the first part, but he shall not enter upon his duties until his nomination shall be approved and confirmed by the General Manager or other managing officer of each of said lessees. All subordinate officers, agents and employes of the party of the first part engaged in the operation of the premises hereby demised, or any part thereof, shall be subject to peremptory discharge and removal on the request of any of the parties hereto.

Removal of Officers Settled by Arbitration

Twelfth. If, at any time, any of the said lessees shall consider itself aggrieved or injured by the conduct of the General Manager or other managing officer charged with or assuming the operation and control of said demised premises, such officer shall be immediately removed and discharged by the party of the first part upon the request of said complaining lessee, unless the party of the first part shall determine that there is no just cause of complaint against such officer. And unless such officer shall be removed, or in case any controversy shall arise between the parties hereto, or any of them, in respect to the true construction of this agreement, or [fol. 45] any part thereof, or in respect to the amount to be charged to or paid by the said lessees or any of them, from time to time, for the rights and privileges hereby granted, or for the services herein required and provided to be rendered, or in respect to the fairness and impartially of the party of the first part, or of its officers, agents and employes in handling their business, or in furnishing facilities

in connection with their business, and in case such controversy cannot be adjusted between the parties, the same shall be submitted to determination by arbitration, as follows: Said lessee complaining shall select and report to the party of the first part, its president or managing agent, in writing, a disinterested person as referee, which writing shall specify the matters and things complained of by said lessee, and the party of the first part shall thereupon select a disinterested person as its referee, and report his name to the complaining party, and if the party of the first part shall fail or neglect to make and report such selection for the period of ten days after receiving the notice aforesaid, then the referee selected by said complaining party shall make such appointment and selection for the party of the first part, and the two so selected shall elect a third, who shall also be a disinterested person and not an officer, agent or employe of any company having a contract for the use of its property with the party of the first part, and shall be a person of experience and skill in railway management, and the three persons so selected shall, after ten days notice in writing to the parties of the time and place fixed for the hearing, proceed to hear and determine such controversy, and their decision, or that of a majority of them, expressed in writing, shall be final and conclusive upon said parties; but pending such reference no lessee shall be exonerated from paying any amount so in controversy to the party of the first part. But after such award or decision shall have been rendered, such lessee shall have the right to credit any amount found to be due it or overpaid by it upon any subsequent dues of the same class; and until the performance of or compliance with any such award by the party of the first part, such [fol. 46] lessee shall be absolved from any obligation to make any of the payments provided for in this contract, except the fixed rental of twenty-two thousand, five hundred dollars, payable as aforesaid.

Default in Payments 60 Days

Thirteen. If any of said lessees shall make default for the period of sixty days in the payment of any of its said monthly rents, tolls, dues and compensation, or of any installment or part thereof, at the time and place when and where the same is required to be paid as aforesaid, the said party of the first part may at its option, or any time thereafter, such default continuing, exclude all passenger and freight trains of such delinquent from the tracks of the party of the first part, and its passenger trains from the said Union passenger depot until such default and all subsequently accruing defaults shall be made good, and may proceed in any appropriate action, either at law or in equity, to recover the same and any subsequently incurred default, from such delinquent. And the said delinquent shall, notwithstanding such exclusion in consequence of its default, remain bound by all the covenants herein stipulated by it to be performed.

Bonds

And the said party of the first part, for its corporate purposes, and the better to enable it to perform the covenants herein provided to

be performed by it, being about to borrow the sum of one million five hundred thousand dollars, to be evidenced by fifteen hundred bonds of one thousand dollars each, in the usual form of railroad bonds, to become due in forty years from the date thereof, and to bear six per cent, annual interest, payable quarterly, principal and interest payable in the gold coin of the United States, and to secure the same by a first mortgage or deed of trust upon all its corporate property and franchises now owned or thereafter to be acquired, together with all its income and revenues, which said mortgage shall be subject to all the convenants contained in this contract.

Bonds and Mortgage

It is further convenanted between the parties hereto, that any income bonds issued and mortgage made to secure them, shall be [fol. 47] made also subject to the terms of this agreement, and shall not bear a greater rate of interest than six per cent. per annum, non-cumulative, to be paid only out of the net earnings of the said party of the first part, after paying all expenditures for renewals, betterments, repairs, operating expenses and the interest upon said first mortgage bonds; that all mortgages of the property, rights privileges and franchises of the party of the first part shall be subject to the contract, but such mortgage- may transfer or assign this contract to the trustee named in such mortgage by way of security to the bonds issued and secured thereunder; that no sale of the property of the party of the first part by the trustee or trustees named in any such mortgage, or under any legal proceedings under such mortgage, shall divest or impair the rights and privileges of the said lessees or any of them, and that any purchaser at any such sale shall be held and taken to be the successor of the party of the first part hereto, and as such bound by the covenants herein contained.

Capital Stock

It is further covenanted and agreed by and between the parties hereto, in consideration of the premises, and in consideration of the personal ownership by the said lessees of the capital stock of the party of the first part, as follows, that is to say:

First. The capital stock of said party of the first part shall consist of ten thousand shares of one hundred dollars each, and shall never be increased or diminished without the consent of each of said lessees, so long as said lessee shall continue to be the owner and holder of any part of said capital stock.

Directors

Second. That the Board of Directors of the said party of the first part shall consist of twelve members, divided into three classes, as now provided by the Laws of the State of Illinois; that the number of directors shall never be changed without the consent of each

of said lessees, so long as said lessee shall continue to be the owner and holder of any part of said capital stock; that the privilege of [fol. 48] cumulative voting for directors shall never be abridged so as to prevent each of said lessees from electing the one-fourth part of the entire membership of said Board, and should any vacancy occur in said Board of Driectors by reason of the death, resignation or other incapacity to act of any member thereof, elected by the stock held by any of said lessees, such vacancy shall be filled only on the nomination of the lessee which elected the member whose vacancy is to be filled; but should such lessee fail to nominate such person to fill such vacancy at the meeting of the Board held for that purpose, of which meeting at least ten days' written notice shall have been given to each of said lessees, then the vacancy may be filled by the votes of a majority of the Board of Directors.

Executive Committee

Third. That the Board of Directors of said party of the first part may delegate its duties to an Executive Committee, to consist of four members of the Board of Directors, who shall be chosen by the Board by ballot; that at such election the privilege of cumulative voting shall be exercised by the members of said Board, and shall never be abridged so as to prevent the members of said Board elected by the votes of each of said lessees respectivly, from choosing one of the members of said Executive Committee; that should any vacancy occur in the said Executive Committee by the death, resignation or other incapacity to act of any member, the vacancy shall be filled on the nomination of the remaining members of the Board by whose votes he was chosen and not otherwise, except that in case of default of such remaining members of the Board to fill such vacancy the vacancy may be filled by the remaining members of the Executive Committee, at a meeting held for that purpose, of the time and place of which ten days' written notice shall have been given to the members of the Board by whose vote such vacancy is to be filled, that no action of the said Board of Directors or of the said Executive Committee shall be valid during the existence of any vacancy in its membership, except the filling of such vacancy; no action shall at any time be taken by the said Board or Executive Committee affect- [fol. 49] ing either of said lessees or its business, without the vote of a majority of the whole membership thereof; nor shall any action of the said Board or of the Executive Committee affecting either of said lessees or its business be valid unless five days' personal notice shall have been given of the time and place of such meeting to each of the members of said Board or Committee as the case may be, and in case of the sickness of any member of said Executive Committee or in case of the inability to attend any of the meetings of said Committee, he shall have the right to appoint one of the other members of the Board of Directors as his proxy to attend such meeting and act and vote thereat in his place and stead.

Stock Issues

Fourth. The certificate of capital stock of the party of the first part shall be issued as follows: One certificate of twenty-five hundred shares thereof to the Wabash, St. Louis and Pacific Railway Company, one certificate of twenty-five hundred shares to the Indiana, Bloomington and Western Railway Company, one certificate for twenty-five hundred shares to the Peoria and Jacksonville Railroad Company, and one certificate of twenty-five hundred shares to the Peoria, Decatur and Evansville Railway Company; and all of said certificates of capital stock shall express upon their face that they are not transferable in whole or in part, without the consent in writing of the Wabash, Saint Louis and Pacific Railway Company, and the Indiana, Bloomington and Western Railway Company, the Peoria and Jacksonville Railroad Company, and the Peoria, Decatur and Evansville Railway Company, except that stock issued on request of either of the said companies to any person to qualify him as a member of the Board of Directors, shall be transferable to the company on whose request it shall have been issued, without the consent of the other companies, but certificates of stock so issued shall express upon their face that they are only transferable to the company on whose request they were issued, without the consent of the other companies above mentioned.

[fol. 50] By Laws

Fifth. The By-Laws of the party of the first part hereto containing any of the foregoing provisions sshall never be altered or amended without the consent in writing of all such lessees as shall continue to be holders of any part of the capital stock of the party of the first part.

It is stipulated that the charges of the party of the first part for the services herein provided to be by it rendered, shall be at the usual rates for similar services in other cities, and shall not be reduced until the net income of the party of the first part fully provides for the interest upon its first mortgage and income bonds.

In testimony whereof, the said parties hereto have caused these presents, and four others of like tenor and effect, to be executed by their respective Presidents and attested by their respective Secretaries under their several corporate seals, this first day of February, A. D. 1881.

[fol. 51] EXHIBIT NO. 3 TO BILL OF COMPLAINT

Interstate Commerce Commission

No. 13110*

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY

v.

PEORIA & PEKIN UNION RAILWAY COMPANY

Submitted March 18, 1922. Decided April 13, 1922

Switching charges of defendant effective from complainant's rails, and proposed from protestant's rails, at Peoria, Ill., to defendant's tracks at Peoria and East Peoria, Ill., found unjustly discriminatory and unduly prejudicial. Unlawful discrimination and prejudice ordered removed. Suspended schedules ordered cancelled.

M. M. Joyce and Donald Evans for complainant.

Silas H. Strawn and Frank H. Towner for protestant and interveners.

R. V. Fletcher, John M. Elliott, Thomas W. White, and John B. Cockrun for defendant.

James A. Fenelon for Eighth District Coal Operators Association; John W. Bingham for Corn Products Refining Company; W. J. Gorman for United States Food Products Corporation, Liberty Yeast Company, and American Distillery; E. G. Schaeffer for Keystone Steel & Wire Company; and W. E. Schuman for city of Pekin, Ill.

Report of the Commission

Division 2, Commissioners Daniels, Esch, and Cox

ESCH, Commissioner:

These cases were separately heard but were argued together and will be disposed of in one report. In No. 13110 the Minneapolis & St. Louis Railroad Company, hereinafter referred to as complainant, attacks as unreasonable, unjustly discriminatory, and unduly prejudicial, the charge of $4 per car established August 30, 1921, by the Peoria & Pekin Union Railway Company, hereinafter referred to as defendant, for switching freight cars between the rails of complainant at Peoria, Ill., and defendant's tracks in its East Peoria, Ill., yards, where the cars come from or are destined to points beyond the Peoria-Pekin, Ill., switching district. The Chicago & Alton Railroad Company and Peoria Railway Terminal Company inter-

*This report also embraces Investigation and Suspension Docket No. 1455, In the Matter of Intermediate Switching Charges at Peoria and Pekin, Ill.

vened in support of the complaint. In Investigation and Suspension Docket No. 1455, by schedules filed to become effective December 16, 1921, defendant proposed to establish charges of $4 per car for switching freight cars in similar service between the Peoria Railway Terminal at Peoria and defendant's tracks in the East Peoria yards, and $3.50 per car between the Peoria Railway Terminal and defendant's tracks in yards other than the East Peoria yards. Upon protest of the Peoria Railway Terminal Company, hereinafter referred to as protestant, the tariff was suspended until May 15, 1922.

The rails of complainant terminate at Iowa Junction, a point within the switching limits of Peoria, but approximately two miles from the passenger station at that point. Protestant has a line from Pekin, along the west bank of the Illinois River to Peoria with terminal facilities at both points. Pekin is situated on the east bank of the Illinois River and Peoria on the west bank approximately 9 miles apart. Defendant has a single track line to Peoria from a point on the west bank of the river directly across from Pekin, which line generally parallels the line of protestant. On the east side of the river defendant has a double track line between Pekin and Peoria with a bridge crossing at Peoria, where connection is made [fol. 52] with the single track line. Protestant and defendant have connections with trunk lines at Pekin and at Peoria and compete in the handling of both local and through traffic. Defendant has terminal yards in Peoria proper and at East Peoria, a point on the east bank of the Illinois River but within the switching limits of Peoria. Complainant and protestant can interchange traffic with all of the trunk lines which enter Peoria proper, except the Chicago & Northwestern, without using defendant's facilities. The termini of the trunk lines serving Peoria from the south and east or at or near defendant's East Peoria yard, and traffic interchanged between those lines and complainant or protestant is handled by defendant.

The capital stock of protestant is jointly owned by the Chicago & Alton and Chicago, Rock Island & Pacific railroads. The capital stock of defendant is jointly owned by the Illinois Central, Cleveland, Cincinnati, Chicago & St. Louis, Lake Erie & Western, Chicago, Peoria & St. Louis, Chicago & Northwestern, and Toledo, Peoria & Western Railroads. The six roads last named, also the Chicago & Alton and Pittsburgh, Cincinnati, Chicago & St. Louis railroads, have contracts with defendant under which defendant agrees to perform terminal services for them and under which they are granted certain rights to the use of defendant's facilities. Complainant had a similar contract with defendant which expired March 31, 1921. Complainant declined to renew this contract and entered into an agreement with the Chicago, Rock Island & Pacific Railway whereby it uses the terminal facilities of that road at Peoria proper. But these facilities do not enable complainant to interchange traffic with defendant's tenant lines, and as before indicated defendant's facilities are used in making such transfer.

Cars coming into Peoria over the rails of complainant and going to tenant lines of defendant at East Peoria for outbound movement

are delivered to defendant at Iowa Junction, usually in trains with cars otherwise destined, and are switched by defendant to the East Peoria yards, where the trains are broken up and the cars switched to designated tracks and placed in new trains for outbound movement. On this traffic defendant performs a train break-up, switching, and train make-up service. In the reverse direction defendant performs a similar service except that it does not make-up trains for complaintant, the cars being merely deposited in complaintant's Bartlett yard situated just west of Iowa Junction. Cars coming into Peoria via protestant's line for outbound movement via the Chicago & Northwestern are delivered by protestant to defendant upon an interchange track in what is known as the Chicago & Northwestern yard. This yard was formerly operated by and as a part of the Chicago & Northwestern but is now leased and operated by defendant as a part of its terminal facilities. After the defendant receives the cars from protestant it switches them to designated make-up tracks in the Chicago & Northwestern yard and places them in trains for outbound movement. Defendant performs no break-up service on this traffic and such switching as it performs seems to be largely, if not wholly, incidental to the make-up service for the Chicago & Northwestern. Cars which come in over protestant's rails and are to move outbound via lines whose rails terminate at East Peoria are taken in train lots by protestant to defendant's yards 90 and 91, which are situated approximately one mile from the end of protestant's rails. Defendant switches the trains from these yards to the East Peoria yards where they are broken up and the cars switched to appropriate tracks and placed in trains for outbound movement. The service rendered by defendant upon this traffic is similar to that rendered in connection with cars coming from complaintant's rails except that the trains are received at yard- 90 and 91 instead of at Iowa Junction. In reverse direction defendant delivers the cars on protestant's own rails but performs no make-up service.

It is the contention of the complaining and protesting parties that defendant's facilities, insofar as the traffic here involved is concerned, are mere terminal projections of the tenant lines; that it is the duty of the tenant lines to receive and deliver through traffic at complaintant's and protestant's rails and that defendant by reason of its relation to the tenant lines is precluded from making a separate charge. In determining these contentions we may look to the contracts between defendant and its tenants and the interpretation placed upon them by the contracting parties as evidenced by actual operation thereunder.

[fol. 53] The preamble to the contract entered into in 1881 between defendant and its original proprietary lines recited that those lines " for the more convenient and economical transaction of their business and the better accommodation of the public desire to extend their facilities in the city of Peoria * * * and to that end have caused to be organized and incorporated * * * the said Peoria and Pekin Union Railway Company * * *. The contract further recited that defendant had acquired certain facilities and that the use and enjoyment of those facilities within the limitations

of the contract were leased and demised to the proprietary lines, which at that time were the only tenants. The tenants were granted the use of defendant's main and passing tracks between Pekin and Peoria for the movement of their trains with their own power and the "right to the use of all the transfer tracks, side tracks, switches, and turnouts and all other terminal facilities of the first party (defendant) * * * for the transfer of loaded and empty freight and other cars by the said first party from and to all freight houses, * * * and to and from the tracks and warehouses of other railroads, with which any of the tracks of the first party shall at any time be connected * * *." These provisions show that defendant was primarily created to perform terminal work which would normally be done by the tenants individually. But they also recognize a separate character in defendant in that its facilities may be used in purely terminal service only through defendant as the operating medium. So far as purely terminal service was concerned the tenants acquired only the right to have defendant handle their traffic.

The contract also provided that no stockholder should transfer its holding of capital stock of defendant without the consent of all other stockholders; that the board of directors of defendant should be selected by the proprietary lines and that each should at all times have equal representation on the board; that no managing officer of defendant should be selected without the approval of each proprietary line and that subordinate officers and employes should be subject to peremptory discharge on the request of any party to the contract. The contract- with the present proprietary lines are substantially similar and while disclosing a purpose on the part of those lines to keep the affairs of defendant closely within their control, do not necessarily establish in defendant the status alleged by complainant. Furthermore, two of the tenant lines hold no stock in and have no control over the affairs of defendant.

Defendant is not shown as an intermediate concurring carrier in tariffs naming joint rates via Peoria, or in many instances as an originating or delivering carrier in tariffs of the tenant lines naming rates to and from Peoria. But this has no particular significance as our tariff regulations do not require the concurrence of purely intermediate or terminal switching lines in tariffs of this class. Defendant does not issue bills of lading for shipments originating on its rails and routed via tenants from Peoria or East Peoria. This also has little significance as originating carriers which perform switching services only do not usually issue bills of lading. Order of May 20, 1911 Relative to Irregularities in Dating Bills of Lading. There is some conflict in the testimony as to whether defendant pays per diem on cars which it handles in transfer service between its connections or participates in the payment of claims for loss and damage.

The contracts clearly grant to the tenants the right to full use of defendant's terminal facilities in having their traffic transferred between their rails and the rails of carriers with which defendant connects, and obligates defendant to perform the transfer service where

demanded by the tenants. But we do not concur in the view expressed by complainant that having the right carries with it the obligation on the part of the tenants to exercise the right in full and pay the entire cost of the transfer service. The testimony shows that in the interchange of cars between tenant lines, each tenant has paid a part of the cost of the intermediate service rendered by defendant. The contracts provide that each tenant shall pay to defendant annually $22,500.00, plus a share of maintenance and upkeep costs on main tracks and certain appurtenant facilities used directly by the trains of the tenant or by defendant in performing transfer service for the tenant, and a reasonable sum per car which is to approximate as nearly as may be the actual cost of the service rendered by defendant. At present this latter charge is $2.70 per car. As illustrative, traffic coming into East Peoria via the Lake Erie & Western and going out from Peoria over the Chicago & Northwestern the inbound carrier pays defendant, in addition to the annual rental, $2.70 per car, plus its share of the upkeep and maintenance costs, and the outbound carrier likewise pays defendant, in addition to the annal rental $2.70 per car plus its share of the main- [fol. 54] tenance and upkeep costs. The total expense to each tenant under this arrangement is stated by defendant to be about $4. per car. Not only has the above practice prevailed as to traffic interchanged between tenant lines of different ownership, but it has also been followed in the case of traffic interchanged between the different divisions of intervenor, Chicago & Alton. It is clearly evident, therefore, that according to the interpretation placed upon the contracts by the parties thereto, defendant is not fully compensated by the amount it receives from one tenant or one division of intervenor. If this is true as to traffic transferred for tenant lines, we do not see how there can be escape from the conclusion that defendant is not fully compensated by the tenant lines for the service it renders on traffic transferred between tenants and non-tenants.

Carriers whose rails do not connect at interchange points may join in the establishment of through routes and joint rates and may employ a switching line to effect transfer of traffic between their rails. The extent to which each shall participate in compensating the switching line under such an arrangement is largely a matter of agreement betwen the employing carriers. In the absence of agreement to the contrary, it would not seem unfair that the expense should be shared equally. However, divisions are not at issue in these cases. The question for determination is whether defendant may lawfully maintain a tariff charge for service which it renders and is not being compensated for under its contracts with its tenants. It is interesting to note, however, that at the time of fixation of divisions of joint rates as between lines east of Peoria and those west, complainant was a tenant of defendant and as such bore its share of the interchange expense. It has now withdrawn from tenancy and desires to shift to the tenant lines the portion of the expense which it formerly bore.

Southern Pacific Terminal Company v. I. C. C., 219 U. S. 498, and Chicago, Milwaukee & St. Paul v. Minn. Civic Assn., 247 U. S.

490, are cited as supporting the contention that defendant is a mere projection of the rails of the tenant lines. The facts and circumstances in those cases were materially different from those in the instant cases, and we do not consider the decisions as controlling here. Defendant specifically reserves in the contracts with its tenant lines the right to perform terminal services and generally carry traffic for others, and this right it extensively exercises. It files tariffs with and makes reports to us and maintains local freight and passenger service. In St. Louis, Springfield, & Peoria R. R. v. P. & P. U. Ry. Co., 26 I. C. C., 226, we found defendant to be a common carrier subject to the act. The evidence in these cases substantiates that finding. We are of the opinion and find that defendant is an independent common carrier and as such entitled to just and reasonable compensation for the services which it renders. We are further of opinion and find that, with possibly the exception of traffic interchanged between protestant and the Chicago & Northwestern, defendant is not now compensated by the tenant lines for all the service it renders in effecting transfers between those lines and nontenant lines, and may maintain reasonable tariff charges for such uncompensated service provided in so doing it does not practice unlawful discrimination.

Defendant performs interchange service between the rails of its tenants and the Chicago, Burlington & Quincy and Chicago, Rock Island & Pacific Railroads, and makes no charge for such service and receives no compensation therefor except such as it receives under its contracts with its tenant lines. Complainant is in competition with the two lines mentioned in the handling of traffic from and to certain territories. Defendant while stating that there is a distinction to be drawn between complainant and the two roads above mentioned in that the latter have more extensive terminals at Peoria does not attempt to justify in full the failure to make a charge on traffic interchanged with these roads, and states that negotiations are now under way looking to the securing of compensation from those lines for services for which it is not now compensated by its tenants. We are of opinion and find that the charges under consideration are unjustly discriminatory and unduly prejudicial against complainant and protestant.

The records are not sufficiently developed to justify an expression of opinion as to what would constitute reasonable charges, but if defendant elects to remove the discrimination and prejudice by making a charge on traffic handled in interchange service between the Chicago, Rock Island & Pacific and Chicago, Burlington & Quincy railroads and defendant's tenants, we will consider a petition [fol. 55] to reopen the cases for the purpose of determining what would constitute reasonable charges. Orders requiring the removal of the unlawful discrimination and prejudice and cancellation of the suspended schedules will be entered.

[fol. 56] Order

At a Session of the Interstate Commerce Commission, Division 2, Held at Its Office, in Washington, D. C., on the 13th Day of April, A. D. 1922

No. 13110

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY

v.

PEORIA & PEKIN UNION RAILWAY COMPANY

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said Division having on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, notified and required to cease and desist, on or before July 13, 1922 and thereafter to abstain from practicing the unjust discrimination and undue prejudice found in said report to exist in respect of said defendant's charges for intermediate switching between complainant and other railroads at Peoria and East Peoria, Ill., of freight cars moving in interstate commerce from and to points beyond the Peoria-Pekin, Ill., switching district.

It is further ordered, that said defendant be, and it is hereby, notified and required to establish on or before July 13, 1922, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain charges or practices with respect to intermediate switching between complainant and other railroads at Peoria and East Peoria, Ill., of freight cars moving in interstate commerce from and to points beyond the Peoria-Pekin, Ill., switching district which will avoid and prevent the unjust discrimination and undue prejudice found to exist in said report.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission, Division 2.

George B. McGinty, Secretary. (Seal.)

[fol. 57] Order

At a Session of the Interstate Commerce Commission, Division 2, Held at Its Office, in Washington, D. C., on the 13th Day of April, A. D. 1922

Investigation and Suspension Docket, No. 1455

INTERMEDIATE SWITCHING CHARGES AT PEORIA AND PEKIN, ILL.

It appearing, That by order dated December 15, 1921, the Commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules described in said order, and subsequently ordered that the operation of said schedules be suspended until May 15, 1922;

It further appearing, That a full investigation of the matters and things involved has been had, and that said Division, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, that the respondent herein be, and it is hereby, notified and required to cancel said schedules, insofar as they are intended for application to shipments moving in interstate commerce on or before May 14, 1922 upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the interstate commerce act, and that this proceeding be discontinued.

By the Commission, Division 2.

George B. McGinty, Secretary. (Seal.)

[fol. 58] EXHIBIT NO. 4 TO BILL OF COMPLAINT

Interstate Commerce Commission

Investigation and Suspension Docket, No. 1596 [1]

INTERMEDIATE SWITCHING CHARGES AT PEORIA, ILL.

Submitted November 9, 1922. Decided December 22, 1922.

1. Schedules filed by the Peoria & Pekin Union Railway Company found not justified, cancellation ordered.
2. Original report in No. 13110, 68 I. C. C., 412.

R. V. Fletcher and J. M. Elliott for Peoria & Pekin Union Railway Company.

M. M. Joyce, Donald Evans and F. B. Townsend for Minneapolis & St. Louis Railroad Company.

[1] This report also embraces No. 13110, Minneapolis & St. Louis Railroad Company v. Peoria & Pekin Union Railway Company.

Kenneth F. Burgess and Walter McFarland for Chicago, Burlington & Quincy Railroad Company.

A. B. Enoch for Chicago, Rock Island & Pacific Railway Company.

Silas H. Strawn and F. H. Towner for Peoria Railway Terminal Company.

Jas. A. Knowlton for St. Louis, Springfield & Peoria Railroad Company.

W. T. Cornelison for Peoria Board of Trade, Mueller Grain Company, Lessees of Central City Elevator, and Burlington Elevator Company.

Report of the Commission

By the COMMISSION:

In the original report in No. 13110, 68 I. C. C., 412, which also embraced Investigation and Suspension Docket No. 1455, In the Matter of Intermediate Switching Charges at Peoria and Pekin, Ill., we found that the Peoria & Pekin Union Railway Company, hereinafter referred to as respondent, was a common carrier and performed certain uncompensated intermediate services at Peoria and East Peoria, Ill., between the Minneapolis & St. Louis Railroad, hereinafter referred to as complainant, and the Peoria Railway Terminal, on the one hand, and the proprietary and non-proprietary tenants of respondent, on the other hand; that reasonable tariff charges might be assessed for such uncompensated services; but that the charges then effective to and from complainant's rails, and those proposed to and from the Peoria Railway Terminal, were unjustly discriminatory and unduly prejudicial, in that no similar charges were assessed on traffic handled in intermediate service between the Chicago, Burlington & Quincy or Chicago, Rock Island & Pacific, herein called the Burlington and Rock Island, respectively, and respondent's tenants. No finding was made with regard to the reasonableness of the charges.

[fol. 59] By schedules filed to become effective July 1, 1922, respondent proposes to remove the discrimination and prejudice by the establishment of charges for intermediate service on traffic to and from the Burlington and Rock Island. The schedules also propose changes in the charges formerly proposed on traffic to and from the Peoria Railway Terminal. The schedules define the proposed charges as "Intermediate switching rates on all freight cars from and to points beyond the Peoria-Pekin switching district regardless of origin or destination, except empties on which this Company receives a loaded haul one way. Intermediate service only. * * * * * Will not apply to switching service rendered tenant companies under tenancy contracts." Upon protest of the Burlington, the Rock Island, and Peoria Railway Terminal, hereinafter referred to as protestants, the operation of the schedules was suspended as to interstate traffic to November 28, 1922, and respondent has voluntarily postponed the effective date of the suspended schedules to February 1, 1923. Upon petition of complainant No. 13110 was re-opened for further hearing in connection with No. 1596.

Respondent was incorporated under the general railroad act of Illinois in September 1880; and in November, 1880, and January 1883, respectively, acquired by purchase a section of railroad formerly belonging to the Peoria, Pekin & Jacksonville Railroad, extending along the west side of the Illinois River from Pekin to Peoria, about 9 miles, and a section formerly belonging to the Peoria & Springfield Railroad, extending from Pekin along the east side of the Illinois River to Bridge Junction, Ill., at which point there was a connection with the section already acquired. In January, 1881, respondent acquired by lease, and has since operated, terminal properties and facilities in Peoria owned by the Toledo, Peoria & Western. Since the date of its creation respondent has materially enlarged its facilities and now owns 26.9 miles of main line, 116.5 miles of siding and yard tracks, 39 locomotives and 11 passenger and 234 freight cars, and has an average of 1,200 employees.

On February 1, 1881, respondent entered into contracts with the Indiana, Bloomington & Western, now a part of the Cleveland, Cincinnati, Chicago & St. Louis; the Wabash, St. Louis & Pacific, now the Toledo, Peoria & Western; the Peoria & Jacksonville, now the Chicago, Peoria & St. Louis; and the Peoria, Decatur & Evansville, now a part of the Illinois Central, which obligated respondent to perform terminal services for those roads and which gave them certain rights of user in the properties and facilities of respondent. Pertinent extracts from the contracts are quoted in the original report in No. 13110. While the contracts recited, in substance, that respondent had been created by the other contracting parties primarily to perform their terminal work in Peoria, they recognized a separate status in respondent in many ways. Respondent was given, not only the right to perform all terminal services of the other contracting parties, but also the right to engage in other kinds of transportation and to enter into terminal-service contracts with other railroads on the same terms as provided in the contracts with the proprietary lines. Contracts, substantially similar in terms to the original contracts, were subsequently entered into with the successors to the original proprietary lines; with the Chicago & Alton, the Pittsburgh, Cincinnati, Chicago & St. Louis, and complainant, non-proprietary lines; and with the Lake Erie & Western and the North Western, proprietary lines. The contract with the complainant expired on March 31, 1921, and has not been renewed.

For many years respondent's principal terminal yards were on the west side of the Illinois River in the city of Peoria, but, in 1907, the traffic having outgrown the existing facilities, a new yard was constructed directly across the river in East Peoria, and this is now respondent's principal yard. The East Peoria yard is within the switching but not the corporate limits of Peoria.

[fol. 60] On the east side of the river respondent connects with the Illinois Central, Cleveland, Cincinnati, Chicago & St. Louis, and Chicago Peoria & St. Louis at Pekin; with the Chicago & Alton (southern division) at Grove, a point about midway between Pekin and Peoria; with the Lake Erie & Western at Wesley Junction, near the western entrance to the East Peoria yard; and with the

Toledo, Peoria & Western and the Traction System at points just east of the East Peoria yard. On the west side of the river respondent connects with the Toledo, Peoria & Western at Hollis, 7.8 miles from the East Peoria; with complainant and the Peoria Railway Terminal at or near Iowa Junction, about 3.5 miles from the East Peoria yard; with the North Western at C. & N. W. Junction, 2.5 miles from the East Peoria yard; and with the Burlington and Rock Island at points in the city of Peoria, 1.5 and 3 miles, respectively, from the East Peoria yard. There is also a connection with the Toledo, Peoria & Western in the city of Peoria, but this is used principally for passenger traffic. The Chicago & Alton and the Pittsburgh, Cincinnati, Chicago & St. Louis use the tracks of the Toledo, Peoria & Western from the east, and these roads have the same connection with respondent on the east side of the river as the Toledo, Peoria & Western.fr Of the lines with which connection for handling freight is made on the west side of the river, the North Western is the sole tenant of respondent. On the east side all the connections except the Traction System are tenants. Excepting the North Western, all tenant lines run their freight trains with their own power over respondent's rails to and from the East Peoria yards. Therefore, as to through traffic which is interchanged between tenants, excepting the North Western, respondent generally performs no hauling service, except such as is in*d*idental to breaking up and making up trains in the East Peoria yard. For this service respondent publishes a tariff charge of $2.40 per car, reduced from $2.70 on October 3, 1922, and this charge is absorbed by the line-haul carriers. On traffic interchanged between the east-side tenants and the North Western, respondent performs the haul between the East Peoria and the North Western yards under separate arrangement with that line. The North Western yard is situated near the connection between respondent and the North Western. It is owned by the latter road but operated under lease by respondent.

Cars coming into the East Peoria yard from tenant lines and going out of Peoria over non-tenant lines are taken by respondent from the inbound trains of the tenants and hauled to tracks on the west side of the river owned by the non-tenants, and designated by whom as receiving tracks. In the reverse direction the Burlington and Rock Island run their trains over respondent's rails to the East Peoria yard, but respondent hauls the cars to the East Peoria yard when coming from the Peoria Railway Terminal or complainant, and it has expressed a willingness to do likewise with respect to cars coming from the Burlington and Rock Island.

Complainant and protestants do not contend that stock ownership by certain tenants deprives respondent of a common carrier status, or deny that as to certain classes of traffic, not here in question, respondent functions as an independent common carrier, but they contend that as to the through traffic under consideration respondent operates merely as an agency of the tenant lines. Protestants admit, in substance, that even as to the traffic in issue respondent would make of itself a separate carrier by becoming a party to the [fol. 61] joint rates and securing its compensation through divisions.

In other words, it seems to be the position of protestants that respondent has the attributes of the separate common carrier but that it has submerged its identity, as to the class of traffic here involved, by becoming a party to contracts which constitute it an agency. The contentions of the traction system differ materially from those of the other opponents of the proposed charges, recognizing an obligation to pay for interchange service but disputing the propriety of the proposed charge.

The contracts reserve to the tenant lines the right to require of respondent a complete intermediate service, and require each tenant to pay to respondent, in addition to a fixed sum per annum, the maintenance and upkeep costs, apportioned on a wheelage basis, of the main-line tracks and facilities used by the trains or traffic of the tenant, and reasonable charges for switching to and from freight houses and industries and for "The transfer service hereinbefore required to be done to and from connecting railroads, being a uniform rate per car * * * which shall approximate the actual cost of such service as nearly as practicable, which shall include the charges for making up trains." Respondent receives no greater amount from an individual tenant on a car interchanged with a non-tenant than it receives on a car interchanged with another tenant. The Minneapolis & St. Louis, when it was a tenant, assumed part of the cost of the intermediate service, but now contends that the obligations of the remaining tenants cover a complete intermediate service, and that it is absolved from obligation to pay any part of the intermediate expense. Its position in this regard is based in part upon changed conditions in that, since the termination of its contract, it has provided additional tracks near Iowa Junction for the receipt of cars and to that extent is not dependent upon respondent.

The contention that respondent as to the intermediate service is acting solely in the capacity of agent for the tenant lines, is partially predicated upon the ground that those lines, except the North Western, have no terminal facilities in Peoria. As to local traffic to and from Peoria respondent concedes itself to be the terminal agency of the tenants. The tenants hold themselves out to handle traffic to and from Peoria, but they have no independent terminals in that city and employ respondent to do their terminal work. Where a carrier holds itself out to carry traffic to and from a certain point, it must reach that point either over its own facilities or through those of others where two carriers join in the publication of joint rates and establish through routes via junctions where their rails do not meet, there is a holding out to the public of intermediate carriage between their respective lines which must be protected. The general practice is for the intermediate switching road to file a tariff naming its switching charge and this charge is absorbed by one or other of the line-haul carriers under appropriate tariff provisions.

Tariffs of some of the tenants state that those lines have direct connections with other line-haul carriers at Peoria, notwithstanding that the intermediate transfer is performed by respondent, and com-

plainant urges that this is proof that respondent has no separate status as to through traffic. The tariffs are not uniform. Some show respondent as an intermediate carrier; another indicates that there is direct*ion* connection between certain non-tenant lines although their rails do not meet and respondent's facilities are used in effecting the intermediate carriage. Cars interchanged between [fol. 62] tenants and non-tenants are not taken into the accounts of respondent, nor does respondent participate in the per-diem arrangements on such cars. Respondent does not seem to have adhered to a consistent policy with regard to the payment of loss and damage claims on through traffic. In some instances it has participated in the payment of such claims, and it appears to have declined to participate in others. At times when claims for concealed loss and damage were presented to the respondent, it has disclaimed liability on the express ground that it was not an intermediate carrier on shipments through Peoria, but simply an Agent for the tenant lines. This was done by the authority of the President of the Peoria & Pekin Union.

Generally speaking, divisions of the joint rates as among the line-haul carriers were fixed at a time when the entire intermediate service was performed on the west side of the river, and protestants contend that the proposed charges, in substance, represent an effort to change existing divisions, without regard to the provisions of the Interstate commerce and transportation acts.

The Burlington and Rock Island contend that the situation with regard to traffic interchanged with their lines is distinguished from that pertaining to traffic interchanged with complainant, in that they have long had extensive terminals at Peoria, have never been parties to terminal contracts or agreements with respondent, and have always received divisions which did not take into account any portion of the intermediate service.

Should these tariffs become effective, where there are not joint rates and the combination rates break on Peoria, the charges will accrue against the traffic. The resulting increase of rates has not been justified and this furnishes one ground for requiring the cancellation of the proposed schedules.

There are other grounds for such action. The essential difficulty in this case is that what originally was primarily a terminal agency operating in a limited way within a limited territory has in the course of time expended its facilities and enlarged the extent of the services it renders. The contracts under which it receives compensation from its proprietors, even should it assess and collect the proposed charges, are by its own admission, insufficient to reimburse it fully for all the services it has in the past performed and now performs solely as their agent. Without first exacting adequate compensation from its proprietors or tenants by insisting upon a revision of the antiquated contract under which its compensation is fixed, it now contends that these services or certain of them are rendered by it as an independent common carrier, and seeks by tariff publication to exact compensation from non-proprietary connections.

There is here involved not only a very complicated concrete situation, but one which involves the fundamental question whether a common carrier may perform a service of common carriage as an agent for another common carrier, and if so, under what conditions as to the charges therefor, whether under contracts, or partly under contracts and partly by tariff publication. The unbroken construction put upon the interchange services of the Peoria & Pekin Union as well by its proprietors and tenants as by the respondent itself from February 1, 1881 until midsummer of 1921 is consistent only with the assumption that respondent in respect of these interchange services was exclusively an agent of its tenant lines and not a common carrier.

[fol. 63] The Burlington has never paid anything to the respondent for interchange service. Until the present controversy the respondent never has claimed that it performed any service for the Burlington. Divisions with connections have always been arranged in conferences, at none of which has the Union ever been present.

Moreover, the local switching service which the respondent performs on traffic originating or terminating at Peoria proper and moving via the tenant lines is admittedly performed by the Peoria and Pekin Union, not as a common carrier, but solely as an agent for its tenants.

Clearly, the extent to which and the time during which the respondent acts as an agency and the extent and the time as to which it acts as a common carrier cannot depend on its mere say-so. It can not for forty years acquiesce in the role of agent and directly disclaim the responsibilities attaching to an independent common carrier, and immediately, upon its mere assertion as to its status, or upon allegation or proof that it is not fully compensated by its principals for the service it has been claiming to perform, as agents only, acquire the status of a common carrier and exert the latter's rights against connecting railroads.

In short, there is apparently something more necessary to clear up the situation here presented than the mere piece-meal filing of particular tariffs covering services now alleged to be those of a common carrier. We shall not prejudge the question of the status of the respondent, nor the propriety of what rates or charges or divisions or practices should supplant the existing arrangements. In view of the determination made that these schedules have not been justified it will suffice here to indicate that we shall on our own motion institute an investigation, making all parties to this case and all tenants of the Peoria & Pekin Union respondents, to the end that lawful, just, reasonable, and non-prejudicial practices, rates, and charges, and division thereof, shall be established for the services undertaken by them or any of them in connection with traffic moving to, from, through or within the Peoria-Pekin district. There may perhaps properly be excepted such traffic as passenger or local freight traffic between Peoria and Pekin which is admitted on all hands to be performed by that company as an independent common carrier.

In view of the investigation to be undertaken we shall here make no finding in No. 13110, and shall issue a formal order of dismissal in that case, without prejudice to reanvassing the situation there involved in the course of the investigation aforesaid.

We find the proposed schedules have not been justified, and an appropriate order will be entered.

ESCH, Commissioner, dissenting:

This proceeding involves a controversy between carriers, and shippers are not here protesting against increased rates. Respondent was held to be a common carrier subject to the act in St. Louis, Springfield & Peoria R. R. v. P. & P. U. Ry. Co. 26 I. C. C. 223, decided February 10, 1913. If the act requires respondent to file and publish the charges for all of its services, we should not prevent it from complying therewith at the earliest possible moment, even though certain services may be performed under the tenancy contracts; but the suspended schedules provide that the proposed charges "will not apply to switching service rendered tenant companies un-[fol. 64] der tenancy contracts," the records show that respondent is not compensated under the tenancy contracts for the intermediate services to and from non-tenants, except the making up and breaking up of trains of the tenant lines, respondent cannot, therefore, be considered the agent of those lines as to such uncompensated services, and it is entitled to publish reasonable tariff charges therefor, even if the act does not require it to publish all of its charges.

The decision herein deprives respondent of the revenues that it would have received from the proposed charges, pending the outcome of the investigation instituted on the Commission's own motion, and also continues the unjust discrimination and undue prejudice against the complainant found to exist in the original report in No. 13110, 68 I. C. C., 412.

In my opinion the proposed charges are unreasonable and discriminatory in certain instances, but respondent should have been permitted to establish reasonable and nondiscriminatory tariff charges for the services under consideration, and if the line-haul carriers failed to agree as to which of them should absorb such charges, that question could then have been determined in a proceeding to which the tenant, as well as the non-tenant lines, were parties with respondent.

Chairman McChord and Commission- Meyer concur in the above dissent.

Commissioner Cox also dissents.

Commissioner Campbell did not participate in the disposition of this case.

[fol. 65] Orders

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 22nd Day of December, A. D. 1922

Investigation and Suspension Docket, No. 1596

INTERMEDIATE SWITCHING CHARGES AT PEORIA, ILL.

It appearing, That by order dated June 30, 1922, the commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules described in said order, and subsequently ordered that the operation of said schedules be suspended until November 28, 1922; and that the effective date of said schedules has been voluntarily postponed by respondent to February 1, 1923;

It further appearing, That a full investigation of the matters and things involved has been had, and that the commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the respondent herein be, and it is hereby notified and required to cancel said *schdeuls*, on or before January 31, 1923, upon notice to this commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the interstate commerce act, and that this proceeding be discontinued.

No. 13110

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY

v.

PEORIA & PEKIN UNION RAILWAY COMPANY

It appearing, that on April 13, 1922, the commission entered its report and order in the above case, and that on July 10, 1922 this case was reopened for further hearing:

It further appearing, That such further hearing and full investigation of the matters and things involved has been had, and the commission having on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 66] EXHIBIT No. 5 TO BILL OF COMPLAINT

Order

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 8th Day of January, A. D. 1923.

No. 14534

Rates, Regulations, and Practices of PEORIA AND PEKIN UNION RAILWAY COMPANY and Connections at Peoria, Ill., and Nearby Points.

Investigation and Suspension Docket, No. 1596

INTERMEDIATE SWITCHING CHARGES AT PEORIA

No. 13110

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY

v.

PEORIA AND PEKIN UNION RAILWAY COMPANY

Investigation and Suspension Docket, No. 1455

INTERMEDIATE SWITCHING CHARGES AT PEORIA AND PEKIN, ILL.

The Commission having under consideration the question of the lawfulness of the rates, regulations and practices of the Peoria and Pekin Union Railway Company and railroads with which it connects at and in the vicinity of Peoria, Ill.

It is ordered, That the Commission upon its own motion enter upon an investigation into and concerning the lawfulness of the rates, charges, regulations and practices of the Peoria and Pekin Union Railway, and railroads with which it connects at and in the vicinity of Peoria, Ill., as applied to traffic to, from and via Peoria, Ill., including the lawfulness of existing contracts between the Peoria and Pekin Union Railway Company and the so-called tenants of that railroad, also the lawfulness of existing joint rates via Peoria, and the divisions thereof, on traffic moving in connection with the Peoria and Pekin Union Railway Company, and the nature and extent of the facilities furnished and services rendered by any of the respondents to other of the respondents at or near Peoria, whether in make-up or break-up yards, spotting, intermediate or terminal service, or otherwise ,including facilities furnished or services rendered in respect of traffic moving on combination rates which break on Peoria, and the compensation therefor as between respondents; with a view of determining just and reasonable individual and joint rates, charges, regulations, divisions and practices and requiring establishment thereof by order.

It is further ordered, That the Peoria and Pekin Union Railway Company, Peoria Railway Terminal Company and W. G. Bierd and H. I. Battles, Receivers, the Minneapolis & St. Louis Railroad Company, Chicago, Burlington & Quincy Railroad Company, The Chicago, Rock Island & Pacific Railway Company, The Chicago & Alton Railroad Company and William W. Wheelock and William G. Bierd Receivers, Toledo, Peoria & Western Railway Company and S. M. Russell, Receiver, Illinois Central Railroad Company, The Atchison, Topeka & Santa Fe Railway Company, The Lake Erie & Western Railroad Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Chicago, Peoria & St. Louis Railroad Company and Bluford Wilson and William Cotter, Receivers, The Chicago & Northwestern Railway Company, The Pittsburg, Cincinnati, Chicago & St. Louis Railroad Company, and St. Louis, Springfield & Peoria Railroad Company be, and they are hereby, made respondents to this proceeding; and that a copy of this order be served on each of such respondents.

It is further ordered, That Docket No. 13110 and Investigation and Suspension Dockets No. 1596 and No. 1455, be, and they are hereby, reopened, consolidated and made a part of this investigation.

And it is further ordered, That the consolidated proceeding be, and it is hereby, assigned for hearing at the Great Northern Hotel, Chicago, Ill., on February 20, 1923 at ten o'clock before Examiner Gault.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[File endorsement omitted.]

[fol. 67] And afterwards, to-wit: on the 10th day of February, A. D. 1923, there was filed in the office of the Clerk of the District Court of the United States for the Northern Division of the Southern District of Illinois, a certain answer of the United States, with exhibit "A" accompanying the same, which said answer and exhibit are in the words and figures, following, to-wit:

[fol. 68] In the District Court of the United States for the Southern District of Illinois, Northern Division

[Titled omitted]

Answer of the United States—Filed Feb. 10, 1923

United States of America, by its counsel, now comes and for answer to the bill of complaint filed herein against it, says:

I. The bill seeks to suspend or set aside in whole service order No. 37 of the Interstate Commerce Commission entered January 18, 1923, a copy of which is attached to the bill as Plaintiff's Exhibit No. 1.

II. Defendant specifically denies the allegation contained in Paragraph 1 of the bill of complaint that "The said service order No. 37 was not made upon the petition of any party or parties."

III. From the face of the order it appears that the same was made on the petition of the Minneapolis & St. Louis Railroad Company, a copy of which petition will be filed upon the hearing hereof, and it is prayed that the same may be read and considered as if fully incorporated herein; the same is marked United States Exhibit A.

IV. Defendant is informed and believes, and therefore charges as a fact that The Minneapolis & St. Louis Railroad Company is a railroad corporation with its residence in the judicial district of the Southern District of Iowa, and the venue of any suit (if maintainable at all) to suspend or set aside in whole service order No. 37, is in such judicial district.

V. The United States District Court for the Southern District of Illinois is without jurisdiction to entertain the bill of complaint and the Court may not enter any order other than an order dismissing the bill of complaint for want of jurisdiction.

Wherefore, defendant prays that the bill of complaint be so dismissed.

Blackburn Esterline, Assistant to the Solicitor General.

[fol. 69] UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

Blackburn Esterline, being first duly sworn, deposes and says that he is the Assistant to the Solicitor General of the United States, duly appointed and qualified; that he has read the foregoing answer and knows the contents thereof; that the facts therein alleged are true, except as to those facts alleged to be on his information and belief, and as to those facts he believes them to be true. He further states that he is duly authorized to make this affidavit.

Blackburn Esterline.

Subscribed and sworn to before me this 10th day of February, A. D. 1923. Grace Bowler, Notary Public. (L. S.)

[File endorsement omitted.]

[fol. 70] INTERSTATE COMMERCE COMMISSION

WASHINGTON

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is a true copy of complaint and application of The Minneapolis & St. Louis Railroad Company against Peoria & Pekin Union Railway Company, filed with the Interstate Cmomerce Commission on January 6, 1923.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 19th day of January A. D. 1923.

George B. McGinty, Secretary of the Interstate Commerce Commission. (L. S.)

[fol. 71] EXHIBIT A TO ANSWER OF UNITED STATES

BEFORE THE INTERSTATE COMMERCE COMMISSION

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Complainant,

vs.

PEORIA & PEKIN UNION RAILWAY COMPANY, Respondent

Complaint and Application

Comes now the Minneapolis & St. Louis Railroad Company and shows unto this Honorable Commission as follows:

That it is a common carrier organized under the laws of the State of Iowa, operating an interstate line of railroad and possessing an eastern terminus at Peoria, Illinois; that it has by years of effort and application built up a well recognized route for traffic known to the public and to carriers as "the Peoria Gateway", through which gateway this complainant carries a large tonnage, and it is upon the business done and so carried through said gateway that this complainant depends for the major portion of its revenue.

That the Peoria & Pekin Union is a terminal switching facility, owned by certain lines of railroad converging at and near Peoria, Illinois, who make use of such switching facility to gain entrance into said city.

That prior to April 1, 1921, complainant was a tenant of the respondent on which date said tenancy ceased, and complainant became a tenant of the Chicago, Rock Island & Pacific at Peoria, Illinois, and has continued as such tenant up to the present time.

That complainant and the said respondent have been engaged and are now engaged in a dispute and controversy before this Commission involving the right of respondent to make certain charges against this complainant and the measure of such charges on cars switched to and from complainant's line of railroad and the tenants of respondent. That heretofore and on August 31, 1921, pursuant to a one day's notice given, the respondent filed with this commission its Tariff I. C. C. No. 36, wherein it provided for a $4.00 charge "on all freight cars coming from or destined to points beyond the Peoria and Pekin switching district regardless of origin or destination, except empties on which this company receives a loaded haul one way." And which tariff applied between track connections with Minneapolis & St. Louis Railroad and Peoria & Pekin Union Railway tracks in its East Peoria Yards.

[fol. 72] That following the filing of said tariff and in the month

of September, 1921, this complainant filed its complaint and petition charging a violation of the Act to Regulate Commerce and asking that this Commission should so find said act violated in the particulars in the said petition set forth, which petition by reference is made a part hereof. That hearings were had on said complaint, evidence taken and on April 13, 1922, this Commission in said proceeding known as I. C. C. Docket 13,110 rendered its report and order wherein, among other things, it was found and recited that the respondent herein named was "notified and required to cease and desist on or before July 13, 1922, and thereafter to abstain from practicing the unjust discrimination and undue prejudice found in said report to exist in respect of said defendant's charges for intermediate switching between complainant and other railroads at Peoria and East Peoria, Ill., of freight cars moving in interstate commerce from and to points beyond the Peoria, Illinois, switching district." That thereafter and on or about the 26th of May, 1922, this applicant filed its petition for reargument and rehearing in said proceeding; that this Commission found by said opinion that the charges as proposed were unduly prejudicial and unjustly discriminatory towards this complainant in that for similar traffic moving in interchange for the C. R. I. & P. and the C. B. & Q. R. R. no charge was assessed or collected by respondent.

That the respondent herein failed to comply with the suggestion of the Commission contained in said report and without petitioning to have the case reopened filed a tariff to become effective July 1, 1922, against the C. R. I. & P. and C. B. & Q. companies, to which filing a protest by said companies was entered and the tariff was suspended in I. & S. Docket 1596.

The commission reopened Docket 13,110 and the same was consolidated with I. & S. Docket 1596 and a hearing had in Washington on the case as consolidated; and on December 22, 1922, this Commission rendered its report and order therein, wherein it directed cancellation of the schedules in I. & S. Docket 1596, dismissed the complaint in Docket 13,110 and ordered a general investigation of the matters of the practices, rates, charges, etc. at Peoria, making the parties in the consolidated case and the tenant lines of the respondent parties respondent in such case so initiated.

[fol. 73] That said opinion and order continues the unjust discrimination and undue prejudice found to exist in the original report in Docket 13110 and in no manner has the respondent herein removed such discrimination and undue prejudice, and the same stands today an admitted fact greatly to complainant's damage and prejudice.

Complainant further states and shows to the Commission that it has been paying up to January 2, 1923, the sum of $4.00 per car, the tariff charge provided in such unjustly discriminatory and prejudicial tariff, on all cars in Eastbound interchange notwithstanding the said tariff under which said charges had been assessed has been so found to be unduly prejudicial and unjustly discriminatory against this complainant. That complainant has so paid because it was satisfied from past experience that said respondent would refuse

traffic in interchange for complainant, thereby interfering with the flow of interstate commerce and causing great monetary loss to complainant and damage to its business and to its patrons and for the further reason that complainant believed in and relied upon the integrity of complainant's position before the Commission, and assumed that the consolidated case involving an I. & S. proceeding would permit a prompt determination of the issues. Therefore the complainant did not desire to embarass the activities of the Commission or prejudice its own position by in any manner so acting in the premises as would subject complainant to criticism at the hands of the Commission.

That heretofore and during the month of August, 1921, said respondent prior to the filing of any tariff by it in the premises did threaten that it would refuse the interchange of the cars and freight of complainant unless complainant would pay its arbitrary demands, which complainant refused to do, whereupon said Union Company arbitrarily and unlawfully and without authority therefor did refuse to permit the cars of the complainant to be interchanged at Peoria, Illinois. That for several days it persisted in its unlawful action and refusal until complainant, due to its having many hundreds of car containing valuable freight, among which were many cars of perishables, was compelled to file its bill of complaint and obtain a restraining order in the District Court of the United States in and for the Southern District of Illinois, Northern Division, at Peoria by the terms of which restraining order, respondent was enjoined from continuing to obstruct and interrupt interstate commerce. That thereupon and before the hearing on the temporary injunction in said bill sought, the respondent filed its said tariff I. C. C. No. 36, [fol. 74] above referred to, upon learning which said court thereupon dismissed the bill of complaint of this complainant.

That since said tariff has been on file, this complainant had paid a sum in excess of $210,000.00 to the said respondent, that it has now ceased paying any further sums to said respondent by virtue of the provisions of said unlawful and discriminatory tariff, following the opinion of the Commission above referred to and rendered December 22, 1922. That complainant does not propose to make further payments to respondent by virtue of the provisions of said discriminatory and prejudicial tariff until this commission has determined the matters to be investigated in the investigation which it has initiated.

That the revenues of this complainant are at this time greatly depleted and reduced. That it has not been able to promptly pay pressing obligations for material and supplies; that it already has a deficit in its net income account for 11 months ended November 30, 1922, of a sum approximating $824,724.00. Complainant alleges and states that it needs every dollar it can earn to pay its pay roll, maintenance expenses and such obligations as have been created by the purchase of material and supplies, and for it to be obliged to continue paying the charges under a tariff expressly declared by this Commission to be discriminatory and prejudicial, pending the determination of the general investigation ordered by the Com-

mission with the alternative of having traffic stopped, interstate commerce impeded and delayed on account of complainant's refusal to so pay such unlawful charges, places a harsh and unfair burden on this complainant lacking in good conscience.

Complainant states that its President has received the following telegrams from respondent:

"Your wire second re I. C. C. Docket I. & S. 1596 and case No. 13110 received. Peoria and Pekin Union Tariff I. C. C. No. 36 is lawfully on file with Commission and in full force and effect and is binding upon both companies. This company stands ready to handle all business tendered by your company but only upon compliance by your company with said tariff and payment made by your company of charges, in accordance with such tariff. Naturally you will assume full responsibility for many embarrassment- of delays occasioned by your refusal to comply with the tariff now on file and in full force and effect. Unless settlement made upon same basis as in past it necessarily follows that traffic handled for your company will be upon a cash basis."

Because the said respondent has indicated in said telegram of [fol. 75] January 4. 1923, that it will refuse to accept traffic of this complainant and will again stop the flow of interstate commerce, thereby prejudicing the rights of this complainant and flagrantly violating the right of the public to have the avenues of commerce kept open and operated, that this complainant hereby invokes the aid and assistance of your Honorable Body and asks that you exercise the emergency and other powers with which the law has surrounded the Commission, and the same are invoked to the end that the respondent may be ordered, directed and compelled to continue to handle the cars of this complainant in interchange at Peoria and moving under lawfully established rates provided in tariffs on file with this Commission at least until such time as this Commission can determine its findings in the proceeding initiated by it of its own motion and until such further time as the said unlawful, unduly prejudicial and discriminatory situation shall be removed. And for such other orders and action on the part of the Commission as in equity and good conscience it may see fit to exercise.

Respectfully submitted, The Minneapolis & St. Louis Railroad Company, By M. M. Joyce, General Counsel, 514 Metropolitan Life Building, Minneapolis, Minnesota. Dated January 6, 1923. Address of Complainant: Transportation Building, Minneapolis, Minnesota.

THE MINNEAPOLIS & ST. LOUIS R. R. Co., Complainant,

vs.

PEORIA & PEKIN UNION RY. COMPANY, Respondent

DISTRICT OF COLUMBIA, ss:

M. M. Joyce, being duly sworn, on oath deposes and says that he is the General Counsel of the Minneapolis & St. Louis Railroad, the foregoing complainant, that he has had charge of the litigation and proceedings both in court and before the Interstate Commerce [fol. 76] Commission between said complainant and said respondent, that he is familiar with the subject matter of such controversy and has been in close touch and acquaintance therewith, that he had drafted the foregoing application and complaint, has read the same, and has authority to make it, and that he knows the contents thereof and that the matters and things therein stated are true to the best of his knowledge and belief.

M. M. Joyce.

Subscribed and sworn to before me this 6th day of January, A. D. 1923. C. Jackson Keblinger, Notary Public D. C.

[File endorsement omitted.]

[fol. 77] And afterwards, to wit: on the 10th day of February, A. D. 1923, there was filed in the office of the Clerk of the District Court of the United States for the Northern Division of the Southern District of Illinois, Articles of Incorporation, of The Minneapolis & St. Louis Railroad Company of Des Moines, Iowa, together with all amendments thereto, which said articles of incorporation and amendments thereto was and is in the words and figures, following, to wit:

[fol. 78] EXHIBIT IN EVIDENCE

State of Iowa,

Office of the Secretary of State

I, W. C. Ramsay, Secretary of State of the State of Iowa, keeper of the corporate records of the State, do hereby certify that the attached instrument in writing is a true and correct copy of agreement of articles of incorporation of the Minneapolis & St. Louis Railroad Company of Des Moines, Iowa, together with all amendments thereto as appear of record in this office.

In testimony whereof, I have hereunto set my hand and affixed the official seal of the Secretary of State at the Capitol, in Des Moines,

this sixth day of February A. D. nineteen hundred and twenty-three.

W. C. Ramsay, Secretary of State. (Seal, State of Iowa, Secretary of State.)

Indorsed: Filed Feb. 10, 1923. S. T. Burnett, Clerk.

[fol. 79] The Minneapolis & St. Louis Railroad Company and Iowa Central and Western Railway Company.

Consolidation Agreement, Dated May 10, 1916

[fol. 80] Consolidation Agreement

Agreement dated May 10, 1916, by and between:

The Minneapolis & St. Louis Railroad Company (hereinafter called the Minneapolis Company), party of the first part; and

Iowa Central & Western Railway Company (hereinafter called the Iowa Company), party of the second part;

Whereas, the Minneapolis Company is a corporation duly organized and existing under the laws of the states of Iowa and Minnesota, and has outstanding capital stock of the par value of $22,651,000, divided into 226,510 shares of the par value of $100 each, of which 62,651 shares are preferred stock and 163,859 shares are common stock; and

Whereas, the Minneapolis Company owns and operates various lines of railroad in the States of Iowa, Minnesota, Illinois and South Dakota, and also holds and operates under lease the railroad of the Iowa Company; and

Whereas, the Iowa Company is a corporation duly organized and existing under the laws of the State of Iowa, and has outstanding capital stock of the par value of $918,000 divided into 9,180 shares of the par value of $100 each, of which 9,000 are owned by the Minneapolis Company subject to the pledge and assignment thereof under the following mortgages, viz:

(1) Mortgage dated March 1, 1901, executed and delivered by the Iowa Central Railway Company to Morton Trust Company as trustee (hereinafter called the First and Refunding Mortgage of the Iowa Central Railway Company); Union Trust Company of New York being now the successor trustee under said mortgage; and

(2) Mortgage dated January 1, 1912, executed and delivered by the Minneapolis Company to Guaranty Trust Company of New York as trustee (hereinafter called the Refunding and Extension Mortgage of the Minneapolis Company); and

Whereas the Iowa Company is the owner of a certain line of railroad in the State of Iowa which connects with the lines of railroad of [fol. 81] the Minneapolis Company at or near Belmond, in the County of Franklin, State of Iowa, and at or near Corwith, in the County of Hancock, State of Iowa, and which is held and operated under lease by the Minneapolis Company; and

Whereas the lines of railroad of the Minneapolis Company and of the Iowa Company form a continuous line of railroad with each other and admit of the passage of trains over them without break or interruption, and said lines of railroad are not parallel or competing; and

Whereas the Minneapolis Company and the Iowa Company are rerespectively duly authorized by the laws of the States of Iowa and Minnesota to merge and consolidate their respective capital stocks, franchises and properties; and

Whereas it is necessary and desirable in the interest of the Minneapolis Company and of the Iowa Company and of the stockholders of the Minneapolis Company and of the Iowa Company that said companies should merge and consolidate their respective capital stocks, franchises and properties as set forth in this agreement, and that additional moneys should be provided for the payment of outstanding indebtedness and liabilities of said companies and for their other lawful corporate purposes and said moneys can be provided only through the consolidation of said companies as herein set forth;

Now, therefore, this agreement witnesseth:

That in consideration of the premises and of the mutual covenants herein contained and of the sum of Five Dollars by each of the parties hereto to the other in hand paid and of other good and valuable considerations, the receipt whereof is hereby acknowledged, it is hereby mutually covenanted and agreed by and between the parties hereto, each covenanting for itself, its successors and assigns, that they will and hereby do unite their respective capital stocks, franchises and properties, and will and do hereby make a full transfer of their respective railroads, properties and franchises to the new [fol. 82] corporation hereinafter named, and will and do hereby make as full and complete a merger and consolidation as possible of their respective corporations, stocks, franchises, properties, earnings and management under the name of "The Minneapolis & St. Louis Railroad Company," to be a corporation of the State of Iowa, in the manner following, that is to say:

I. The Minneapolis Company and the Iowa Company do severally agree that from and after the first day of July, 1916, the entire railroads, properties and franchises of every kind now held by said companies respectively, and all railroads, properties and franchises hereafter acquired in any way by either of said companies shall be forever owned, held and operated jointly as one line of railroad and as joint estate to be managed and controlled under the name of "The Minneapolis & St. Louis Railroad Company" of Iowa upon the terms hereinafter named and by the board of directors constituted as hereinafter provided; and that the stockholders of the respective companies parties hereto shall be entitled to exchange the stock held by them in each of the companies parties hereto for stock of the said "The Minneapolis & St. Louis Railroad Company" of Iowa in the proportions, upon the terms and subject to the conditions hereinafter named, and that the certificates of stock in said new company to be issued as provided in this agreement shall be full and the only evi-

dence of the rights of the aforesaid stockholders to participate in the property, assets, earnings and income of the new company, and shall be full paid and non-assessable stock, and the private property of the stockholders of the new company shall be exempt from the corporate debts of said company. No stockholder of the Minneapolis Company or of the Iowa Company shall have any right in or to the property, assets, earnings or income of the said new company except upon the exchange of the stock of the Minneapolis Company or of the Iowa Company held by him as the case may be for stock of said new company as provided in this agreement and then only to the extent and subject to the conditions herein set forth.

II. The Minneapolis Company and the Iowa Company do hereby severally agree that from and after said first day of July, 1916, they shall become and shall be forever merged and consolidated into one [fol. 83] new or consolidated company or body corporate under the name of "The Minneapolis & St. Louis Railroad Company," a corporation of the State of Iowa, and by that name shall have and use a corporate seal, shall sue and be sued, plead and be impleaded, contract and be contracted with, and shall use, enjoy and exercise all the rights, powers and franchises of each of the said corporations parties hereto. The said new company formed in pursuance of this agreement is hereinafter referred to as the Consolidated Company. The corporate existence of the Consolidated Company shall commence on said first day of July, 1916, and shall continue for the period of fifty years from said date, but the same may from time to time be renewed or extended as provided by law.

III. The Minneapolis Company and the Iowa Company respectively further agree that from and after said first day of July, 1916, the entire railroads, properties and franchises of every kind of the parties hereto severally, and all the railroads, properties and franchises to which the parties hereto severally are or hereafter may be entitled shall be forever owned, held and operated jointly as one line of railroad to be managed and controlled by the Consolidated Company, and that all the property and asset-, real, personal and mixed, and all the rights, privileges, franchises, immunities, credits, grants, donations, easements and interests belonging to the parties hereto severally or to which either of the said parties *hereto severally or to which either of the said parties* shall be at any time entitled, shall become and be the property and be vested in the Consolidated Company, subject, however, to the provisions of Article V of this agreement. The Consolidated Company shall be empowered to borrow money, and for that purpose to issue bonds, notes and other obligations and to secure the payment of the same by mortgage or pledge on the property and franchises of each of the parties hereto, and to sell said bonds, notes and other obligations at any rate not contrary to law, and also to purchase, lease and construct other connecting and continuous lines of railroad, to construct and purchase bridges, and to purchase and hold the stocks and bonds of other railroad, bridge or transportation companies or telegraph companies, and to consolidate its stock, franchises and property therewith, and

the Consolidated Company shall at all times be empowered to use [fol. 84] the name of either of the companies parties hereto in all ways and for all purposes whenever the same shall be necessary or convenient in the conduct and extension of the railroads, business and property hereby merged and consolidated. The highest amount of indebtedness or liability to which the Consolidated Company shall at any time subject itself shall be such amount as may at the time be permitted by the laws of the State of Iowa.

IV. The Minneapolis Company and the Iowa Company in consideration of the premises do further severally and each of them does hereby agree to and does hereby grant, bargain, sell, release, enfeoff, convey, assign, remise, confirm, transfer and set over unto the Consolidated Company all and singular their and each of their respective railroads, properties and assets, real, personal and mixed, and their and each of their respective franchises, rights, easements, immunities and exemptions, and their and each of their respective earnings, tolls, income and things in action at law or in equity, whether the same are now held and possessed or hereafter acquired, and wherever situated and however held, to have and to hold the same unto the Consolidated Company for its own use, benefit and behoof forever, and each of the parties hereto does hereby further agree to make, execute and deliver from time to time all deeds, grants, assignments, contracts, agreements, instruments and transfers necessary or convenient to carry fully into effect the covenants hereof, and to vest as fully in law as may be all its properties, franchises, rights and immunities as aforesaid in the Consolidated Company.

V. The Minneapolis Company and the Iowa Company do hereby further severally agree that, except as herein otherwise expressly provided, all the debts, liabilities and obligations of each of the parties hereto shall be deemed and taken and they are hereby declared to be from and after the first day of July, 1916, the debts, liabilities and obligations of the Consolidated Company, provided, however, that the property, assets, and franchises of the Iowa Company shall be vested in the Consolidated Company subject only to a lien, first, in favor of Union Trust Company of New York as successor trustee under the First and Refunding Mortgage of the Iowa Central Railway Company, and second, in favor of Guaranty Trust Company of New York, [fol. 85] as trustee under the Refunding and Extension Mortgage of the Minneapolis Company, as additional security for the bonds issued under and secured by said respective mortgages in the order of their priority in the same manner and with the same effect as if the property, assets and franchises of the Iowa Company had been included in and covered by the said respective mortgages when originally executed; and such lien shall be prior to the lien of all other debts, obligations and liabilities except such as shall have been contracted or incurred by the Iowa Company and shall be ou-standing at the date of the consolidation herein provided for. The directors and officers of the Consolidated Company are hereby authorized and directed forthwith to execute, acknowledge and deliver to the said Union Trust Company and to the said Guaranty Trust Company of

New York such further deeds and instruments as may be necessary to make the said lien effective as hereby intended.

VI. The estate and affairs of the Consolidated Company shall be managed by a board of nine directors, who shall elect from time to time a president two or more vice-presidents, a treasurer, a secretary and such other officers as may be provided for in the by-laws of the Consolidated Company and as may be determined by the said board of directors to be necessary or advisable.

The names and places of residence of the directors and officers of the Consolidated Company for the first year shall be as follows:

Directors	Residence
Newman Erb	New York City, N. Y.
F. H. Davis	Elizabeth, N. J.
Frank P. Frazier	New York City, N. Y.
A. C. Doan	New York City, N. Y.
Ward E. Pearson	New York City, N. Y.
Wm. J. Wollman	New York City, N. Y.
T. P. Shonts	New York City, N. Y.
H. E. Huntington	Los Angeles, California.
Frank Trumbull	New York City, N. Y.

Officers	
President, Newman Erb	New York City, N. Y.
Vice-President and Treasurer, F. H. Davis	Elizabeth, N. J.
[fol. 86] Vice-President and General Manager, C. W. Huntington	Minneapolis, Minn.
Secretary, A. C. Doan	New York City, N. Y.

The terms of office of the said directors shall continue until the first Tuesday in October, 1916. The said officers shall hold office for the same period, but any of said officers may be removed at any time by vote of the board of directors.

After the first year the directors shall be chosen at the annual meeting of the stockholders of the Consolidated Company to be held at the office of the Consolidated Company in the City of Des Moines, State of Iowa, on the first Tuesday of the month of October in each year, and shall hold office for the term for which they shall be chosen. The board of directors shall be divided into three classes, the term of office of directors of the first class to expire at the annual meeting next ensuing, of the second class one year thereafter and of the third class two years thereafter, and at each annual election directors shall be chosen for the full term as the case may be to succeed those whose terms expire. Any vacancy in the board of directors occurring by death, resignation or otherwise may be filled by the vote of a majority of the board.

The by-laws, rules and regulations of the Minneapolis Company are hereby adopted and shall hereafter be the by-laws, rules and regulations of the Consolidated Company until the same shall be modified or changed, repealed or rescinded.

The board of directors of the Consolidated Company shall have full power and control over all the assets and property hereby transferred to the Consolidated Company, and shall exercise all the powers corporate and other of the Consolidated Company as the successor of each of the companies parties hereto, and may make and adopt other by-laws prescribing the duties of the officers of the company and regulating the transaction of the company's affairs, and may by proper action modify the by-laws herein adopted, and said board of directors may and shall have and are hereby invested with all the powers and authority conferred upon, vested in or exercised by the board of directors of either of the parties hereto.

[fol. 87] VII. The principal office and place of business of the Consolidated Company shall be in the City of Des Moines, County of Polk, State of Iowa.

VIII. The Consolidated Company shall have a total capital stock of $26,000,000, divided into 260,000 shares of the par value of $100 each, all of one class, but the amount of said capital stock of the Consolidated Company may from time to time be increased by it as provided by law. Each of the holders of the stock of the Consolidated Company shall be entitled to one vote for each share of stock held by such stockholder respectively at every election of directors of the Consolidated Company and upon all other matters that may be acted upon at any meeting of the stockholders of the Consolidated Company.

IX. The shares of stock of the Minneapolis Company and of the Iowa Company shall be converted or exchanged into or for stock of the Consolidated Company in the manner and upon the terms herein set forth, viz:

The Consolidated Company shall issue and deliver to the Minneapolis Company $22,651,000 par value, and to the Iowa Company $9,000 par value, of the capital stock of the Consolidated Company.

(1) $17,793,100 par value of the capital stock of the Consolidated Company to be delivered by it to the Minneapolis Company as aforesaid, shall be offered by the Minneapolis Company, in such manner and within such time as may be determined by the board of directors of the Minneapolis Company, for sale to the stockholders of the Minneapolis Company in the proportions and at the rates following, viz:

(a) To each holder of preferred stock of the Minneapolis Company, for each $100 par value of preferred stock held by him $80 par value of stock of the Consolidated Company for the sum of $20 in cash;

(b) To each holder of common stock of the Minneapolis Company, for each $100 par value of common stock held by him, $78 par value of stock of the Consolidated Company for the sum of $20 in cash.

[fol. 88] To the extent that said stock of the Consolidated Company shall not be subscribed for and purchased by the stockholders of the Minneapolis Company as aforesaid, within the time limited therefor, said stock may be sold by the Minneapolis Company to such other persons and at such rates as may be determined by the board of directors of the Minneapolis Company.

Out of the proceeds of the sale of said $17,793,100 par value of stock of the Consolidated Company, the Minneapolis Company shall pay or cause to be paid to or upon the order of the Consolidated Company the sum of $4,180,200, and the Consolidated Company shall thereupon issue and deliver to the Minneapolis Company $3,132,600 par value additional of the capital stock of the Consolidated Company.

Said $3,132,600 par value of capital stock of the Consolidated Company, together with $4,857,900 par value of the capital stock of the Consolidated Company theretofore delivered by the Consolidated Company to the Minneapolis Company, shall be delivered by the Minneapolis Company, in such manner as may be determined by the board of directors of the Minneapolis Company, to the stockholders of the Minneapolis Company in the following proportions in conversion and exchange for and upon the surrender by said stockholders of the shares of stock of the Minneapolis Company held by them respectively without payment by them therefor, viz:

(a) To each holder of preferred stock of the Minneapolis Company, for each $100 par value of preferred stock held by him, $70 par value of stock of the Consolidated Company;

(b) To each holder of common stock of the Minneapolis Company, for each $100 par value of common stock held by him $22 par value of stock of the Consolidated Company.

(2) The $9,000 par value of capital stock of the Consolidated Company to be delivered by it to the Iowa Company shall be delivered by the Iowa Company in such manner as may be determined by the board of directors of the Iowa Company to the stockholders of the Iowa Company other than the Minneapolis Company in the following proportion, in conversion and exchange for and upon the surrender by said stockholders of the shares of stock of the Iowa Com-
[fol. 89] pany held by them respectively; viz.:

To each stockholder of the Iowa Company, other than the Minneapolis Company, for each $100 par value of stock held by him, $50 par value of stock of the Consolidated Company.

All shares of stock of the Minneapolis Company and of the Iowa Company surrendered for exchange as aforesaid shall be cancelled and delivered to the Consolidated Company. The Minneapolis Company agrees that it will cause to be cancelled and delivered to the Consolidated Company the shares of stock of the Iowa Company owned by the Minneapolis Company as hereinbefore set forth.

X. This agreement shall be perpetual, and each of the parties hereto and the Consolidated Company shall have the power, cooperating together, to perform every act and to do everything which

they may be advised as necessary or proper to carry into effect and more fully complete the perpetual uniting, merger, amalgamation and consolidation of the parties hereto on the terms herein provided; and this agreement shall become effectual when approved by holders of three-fourths in amount of the outstanding shares of the capital stock of each of said parties. The corporate existence of the Minneapolis Company and of the Iowa Company respectively shall continue for such time and to such extent as may be necessary to carry into effect the provisions of this agreement and when the same shall have been fully carried into effect said companies shall be dissolved.

XI. It is expressly agreed that a failure in law to carry into effect the intention of this agreement, or any part thereof, as hereinbefore expressed, shall not render void any part or portion of this agreement that is in itself valid, but that all the valid covenants of this agreement shall be binding and obligatory upon each of the parties hereto, and this agreement and each part thereof shall take effect so far as the same is lawful and authorized notwithstanding the avoidance or invalidity of any other part thereof; and that in the event [fol. 90] of any such failure such steps shall be taken and such contracts shall be made as shall be advised by counsel to carry into effect as far as possible the intents and purposes of this agreement.

In witness whereof the said parties hereto have caused their respective corporate seals to be affixed to this agreement of consolidation, and the same to be signed by their respective Presidents or Vice-Presidents, and attested by their respective Secretaries or Assistant Secretaries.

The Minneapolis & St. Louis Railroad Company, By Newman Erb, President. Attest: A. C. Doan, Secretary. (Corporate Seal.) Iowa Central & Western Railway Company, By F. H. Davis, Vice-President. Attest: A. C. Doan, Assistant Secretary. (Corporate Seal.)

STATE OF NEW YORK,
County of New York, ss:

I, E. A. Adams, a Notary Public in and for the City, County and State aforesaid, duly commissioned as such and duly authorized to take and certify acknowledgements and proofs of deeds and conveyances of land in said State, do hereby certify that on this 12th day of May, 1916, before me personally appeared Newman Erb and A. C. Doan, to me personally known and known to me to be said Newman Erb, President, and the said A. C. Doan, Secretary, of The Min- [fol. 91] neapolis & St. Louis Railroad Company, one of the corporations described in and which executed the foregoing instrument, and known to me to be the same identical persons whose names are subscribed to the foregoing instrument as such President and Secretary, respectively, and they severally duly acknowledged to me that they signed, sealed and delivered the said instrument as their free and voluntary act and deed and as the free and voluntary act and deed of

said The Minneapolis & St. Louis Railroad Company, and that such corporation executed the same for the consideration, duties and purposes therein set forth.

And on said 12th day of May, 1916, the said Newman Erb and A. C. Doan, being by me severally duly sworn, did depose and say, the said Newman Erb that he is the President, and the said A. C. Doan that he is the Secretary, of The Minneapolis & St. Louis Railroad Company, one of the corporations described in and which executed the foregoing instrument; that they resided, the said Newman Erb in the City of New York, N. Y., and the said A. C. Doan in the City of New York, N. Y.; that they knew the corporate seal of said corporation; that the seal affixed to said instrument is the corporate seal of said corporation and that said seal was so affixed and said instrument was signed, sealed and delivered in behalf of said corporation by authority of its Board of Directors, and that they respectively signed their names thereto by like authority.

In witness whereof, I have hereunto set my hand and affixed my official seal this 12th day of May, 1916.

E. A. Adams, Notary Public, Kings Co., No. 30. (Seal.)
Reg. off. No. 8028. Certificate filed in N. Y. Co., No. 58.
Reg. off. No. 8066.

No. 12342, Series B

STATE OF NEW YORK,
County of New York, ss:

[fol. 92] I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify, that E. A. Adams whose name is subscribed to the deposition or certificate of the proof or acknowledgement of the annexed instrument, and thereon written, was, at the time of taking such deposition or proof and acknowledgement, a Notary Public, acting in and for the said County, duly commissioned and sworn, and authorized by the laws of said State to take depositions and also acknowledgments and proofs of Deeds, or conveyances for land, tenements or hereditaments in said State of New York. That there is on file in the Clerk's Office of the County of New York, a certified copy of his appointment and qualification as Notary Public of the County of Kings with his autograph signature. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said deposition, or certificate of proof or acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said Court and County this 13 day of May 1916.

William F. Schneider, Clerk. (Seal.) (10¢ I. R. S. cancelled.)

STATE OF NEW YORK,
County of New York, ss:

I, E. A. Adams, a Notary Public in and for the City, County and State aforesaid, duly commissioned as such and duly authorized to take and certify acknowledgements and proofs of deeds and conveyances of land in said State, do hereby certify that on this 12th day of May, 1916, before me personally appeared F. H. Davis and A. C. Doan, to me personally known and known to me to be the said F. H. Davis, Vice President, and the said A. C. Doan, Assistant Secretary, of Iowa Central & Western Railway Company, one of the corporations described in and which executed the foregoing instrument and known [fol. 93] to me to be the same identical persons whose names are subscribed to the foregoing instrument as such Vice-President and Assistant Secretary, respectively, and they severally duly acknowledged to me that they signed, sealed and delivered the said instrument as their free and voluntary act and deed and as the free and voluntary act and deed of said Iowa Central & Western Railway Company, and that such corporation executed the same for the considerations, duties and purposes therein set forth.

And on said 12th day of May, 1916, the said F. H. Davis and A. C. Doan being by me severally duly sworn, did depose and say, the said F. H. Davis that he is a Vice-President, and the said A. C. Doan that he is the Assistant Secretary, of Iowa Central & Western Railway Company, one of the corporations described in and which executed the foregoing instrument; that they resided, the said F. H. Davis, in Elizabeth, N. J., and the said A. C. Doan, in the City of New York, N. Y.; that they knew the corporate seal of said corporation; that the seal affixed to said instrument is the corporate seal of said corporation and that said seal was so affixed and said instrument was signed, sealed and delivered in behalf of said corporation by authority of its Board of Directors and that they respectively signed their names thereto by like authority.

In witness whereof, I have hereunto set my hand and affixed my official seal this 12th day of May, 1916.

E. A. Adams, Notary Public, Kings Co., No. 30. (Seal.)
Reg. off. No. 8028. Certificate filed in N. Y. Co., No. 58.
Reg. off. No. 8066.

No. 12343, Series B

STATE OF NEW YORK,
County of New York, ss:

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify, that E. A. Adams, whose name is subscribed to the deposition or certificate of the proof or acknowl- [fol. 94] edgment of the annexed instrument, and thereon written, was, at the time of taking such deposition or proof and acknowledgment, a Notary Public, acting in and for the said Cou-ty, duly com-

missioned and sworn, and authorized by the laws of said State to take depositions and also acknowledgments and proofs of deeds or conveyances for land, tenements or here*id*-aments in said State of New York. That there is on file in the Clerk's office of the County of New York, a certified copy of his appointment and qualification as Notary Public of the County of Kings with his autograph signature. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said deposition, or certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County this 13 day of May 1916.

Wm. F. Schneider, Clerk. (Seal.) (10¢ U. S. I. R. S. Cancelled.) Polk County, Iowa. Filed for Record at 8:30 a. m., Jun. 29, 1916, Book 25, page 329. Chas. A. Guth, Recorder. Chas. A. Guth, Deputy.

STATE OF IOWA, ss:

Filed for record in the office of Secretary of State June 29 A. D. 1916 and Recorded in Book W-5 page 38.

W. S. Allen, Secretary of State.

Proof of publication filed July 29, 1916.

[fol. 95] The Minneapolis and St. Louis Railroad Company

Certificate of Amendment of Articles of Incorporation

We, the undersigned, C. W. Huntington, Vice-President, and Raymond B. Alberson, Assistant Secretary of The Minneapolis and St. Louis Railroad Company, do hereby certify that on the 27" day of July, 1916, a special meeting of the stockholders of said company was held at the office of said company in the City of Des Moines, Iowa, for the purpose of authorizing the amendment of the Articles of Incorporation of said company as hereinafter set forth; that said meeting of the stockholders of said company was held pursuant to written waivers of notice of said meeting signed by the holders of all of the capital stock of the company issued and outstanding; and that the holders of all of the capital of said company issued and outstanding were represented by proxy at said meeting.

And we do hereby certify that at said meeting the following resolutions were duly adopted by the affirmative vote of the holders of all of the capital stock of said company issued and outstanding, viz.:

Resolved, That Article or Paragraph VI of the Articles of Incorporation of this company be amended so as to read as follows:

"VI. The estate and affairs of the Consolidated Company shall be managed by a board of not less than three, nor more than eleven, directors, the number of whom shall be fixed from time to time by the by-laws, who shall elect from time to time a president, two

or more vice-presidents, a treasurer, a secretary and such other officers as may be provided for in by-laws of the Consolidated Company and as may be determined by the said board of directors to be necessary or advisable.

The names and places of residence of the directors and officers of the Consolidated Company for the first year shall be as follows:

Directors	Residence
Newman Erb	New York City, N. Y.
F. H. Davis	Elizabeth, N. J.
Frank P. Frazier	New York City, N. Y.
[fol. 96] A. C. Doan	New York City, N. Y.
Ward E. Pearson	New York City, N. Y.
Wm. J. Wollman	New York City, N. Y.
T. P. Shonts	New York City, N. Y.
H. E. Huntington	Los Angeles, California.
Frank Trumbull	New York City, N. Y.

Officers:

President Newman Erb	New York City, N. Y.
Vice-President and Treasurer F. H. Davis.	Elizabeth, N. J.
Vice-President and General Manager C. W. Huntington	Minneapolis, Minn.
Secretary A. C. Doan	New York City, N. Y.

The terms of office of the said directors shall continue until the first Tuesday in October, 1916. The said officers shall hold office for the same period, but any of said officers may be removed at any time by vote of the board of directors.

After the first year the directors shall be chosen at the annual meeting of the stockholders of the Consolidated Company to be held at the office of the Consolidated Company in the City of Des Moines, State of Iowa, on the first Tuesday of the month of October in each year, and shall hold office for the term of one year and until their successors shall have been elected and shall have qualified. Any vacancy in the board of directors occur-ing by death, resignation or otherwise may be filled by the vote of a majority of the board.

The by-laws, rules and regulations of the Minneapolis Company are hereby adopted and shall hereafter be the by-laws, rules and regulations of the Consolidated Company until the same shall be modified or changed, repealed or rescinded.

The board of directors of the Consolidated Company shall have full power and control over all the assets and property hereby transferred to the Consolidated Company, and shall exercise all the powers corporate and other of the Consolidated Company as the successor of each of the companies parties hereto, and may make and adopt other by-laws prescribing the duties of the officers of the Company [fol. 97] and regulating the transaction of the Company's affairs, and may by proper action modify the by-laws herein adopted, and

said board of directors may and shall have and are hereby invested with all the powers and authority conferred upon, vested in or exercised by the board of directors of either of the parties hereto."

Further resolved, That Mr. Newman Erb, President, or Mr. C. W. Huntington, Vice-President, and Mr. A. E. Smith, Assistant Secretary, or Mr. Raymond B. Alberson, Assistant Secretary of this company be, and they are hereby authorized and directed to make, sign, verify and acknowledge any and all certificates required to be made and filed, and to do any and all acts and things that may be necessary to carry into effect the foregoing amendment.

And we do hereby further accordingly certify that the Articles of Incorporation of said company have been amended as herein set forth.

In witness whereof we have made, signed, verified and acknowledged this certificate this 27" day of July 1916.

C. W. Huntington, Vice-President. Raymond B. Alberson, Assistant Secretary. (Corporate Seal.)

STATE OF IOWA,
County of Polk, ss:

On this 27th day of July, 1916, before me personally appeared C. W. Huntington and Raymond B. Alberson, to me personally known, who being by me duly sworn did depose and say: That they were the Vice-President and Assistant Secretary respectively of The Minneapolis and St. Louis Railroad Company; that they had read the foregoing certificate by them subscribed and knew the contents thereof; that the seal affixed to the foregoing instrument is the corporate seal of said corporation; and that said certificate was executed by them in behalf of said corporation and said [fol. 98] seal affixed by authority and direction of its stockholders at the meeting referred to in said certificate; and said C. W. Huntington and Raymond B. Alberson severally duly acknowledged the foregoing certificate by them subscribed to be true to the best of their knowledge and belief.

Subscribed and sworn to before this 27th day of July, 1916. Wm. M. Wilcoxen, Notary Public in and for Polk County, Iowa. (Seal.)

10988, Polk County, Iowa. Filed for Record at 1:30 P. M. Jul. 27, 1916, Book 25, Page 352.

Chas A. Guth, Recorder. G. W. Mattern, Deputy.

STATE OF IOWA, ss:

Filed for record in the office of Secretary of State July 27 A. D. 1916 and recorded in book W-5 page 303.

W. S. Allen, Secretary of State.

Proof of publication filed Sept. 1-1916.

The Minneapolis & St. Louis Railroad Company

Certificate of Amendment of Articles of Incorporation

We, the undersigned, W. H. Bremmer, President, and R. B. Albertson, Assistant Secretary, of the Minneapolis & St. Louis Railroad Company, do hereby certify that on the 2nd day of October, 1917, the annual meeting of the stockholders of said Company was held at the office of said Company in the City of Des Moines, Iowa, and that at said meeting a majority of the holders of the capital stock of the Company issued and outstanding were present or represented by proxy; and we do hereby further certify that at said meeting the following resolution was duly adopted by the unanimous vote of the holders of all of the capital stock of said company so present at said meeting, viz:

[fol. 99] Resolved: That Article VI of the Articles of Incorporation of this Company as amended be further amended by striking out the following language of said amended Article VI, to-wit:

"After the first year, the Directors shall be chosen at the annual meeting of the stockholders of the Consolidated Company to be held at the office of the Company in the City of Des Moines, State of Iowa, on the first Tuesday of the month of October in each year, and shall hold office for the term of one year and until their successors shall have been elected and shall have qualified. Any vacancy in the Board of Directors occurring by death, resignation or otherwise may be filled by the vote of a majority of the Board;"

and by inserting in lieu thereof the following language, to-wit:

"After the year 1917, the annual meeting of the stockholders of the Consolidated Company shall be held at the office of the Consolidated Company in the City of Des Moines, State of Iowa, on the first Tuesday of the month of May in each year. Directors chosen at the annual meeting of the stockholders held in the month of October, 1917, shall hold office until the annual meeting in the month of May, 1918. Directors chosen at the annual meeting in the month of May, 1918, and those chosen at the annual meetings to be held thereafter, shall hold office for the term of one year, or until their successors shall have been elected and shall have qualified. Any vacancy in the Board of Directors occurring by death, resignation or otherwise may be filled by the vote of a majority of the Board."

It was further moved and seconded at said meeting that the President and the Secretary, or an Assistant Secretary, of said Company, be authorized and directed to prepare the necessary papers to be published and filed for record, according to the laws of the State of Iowa, and to do and perform such acts and things as might be necesary to effectuate said change in the Articles of Incorporation of said Company, which said resolution was duly carried by the unanimous vote of all stockholders present at said annual meeting.

[fol. 100] And we hereby certify that the Articles of Incorporation of said Company have been amended as above set forth.

In witness whereof, we hereunto attach our signatures and the seal of the corporation this 2nd day of October, 1917.

W. H. Bremner, President. R. B. Alberson, Assistant Secretary. (Seal.)

STATE OF IOWA,
County of Polk, ss:

On this 2nd day of October, 1917, before me personally appeared W. H. Bremner and R. B. Alberson, to me personally known, who, being by me duly sworn, did state:

That they are the President and Assistant Secretary, respectively of the Minneapolis & St. Louis Railroad Company; that they have read the foregoing certificate by them subscribed and know the contents thereof; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said certificate was executed by them in behalf of said corporation, and that said seal affixed by authority and direction of its stockholders at the meeting referred to in said certificate, and said W. H. Bremner and R. B. Alberson severally duly acknowledged the foregoing certificate by them subscribed, to be true to the best of their knowledge and belief.

Crom. Brown, Notary Public in and for Polk County, Iowa. (Seal.)

POLK COUNTY, IOWA:

Filed for record at 9.34 A. M. Oct. 3, 1917, Book 26, Page 283.
Chas. A. Guth, Recorder. Chas. A. Guth.

[fol. 101] STATE OF IOWA, ss:

Filed for record in the office of Secretary of State October 3, A. D. 1917, and recorded in book C-6, page 206.

W. S. Allen, Secretary of State.

Proof of publication filed Oct. 31, 1917.

Certificate of Amendment of Articles of Incorporation

We, the undersigned, W. H. Bremner, President, and R. B. Alberson, Assistant Secretary, of The Minneapolis and St. Louis Railroad Company, do hereby certify that on the 7th day of May, 1918, the annual meeting of the stockholders of said Company was held at the office of said Company in the City of Des Moines, Iowa, pursuant to the Articles of Incorporation, due notice of said meeting having been published as required by the By-laws of said company; and that the holders of a majority of the capital stock of the Company issued and outstanding were present at said meeting, in person or by proxy.

And we do hereby certify That at said meeting the following resolution was duly adopted by the affirmative vote of the holders of a majority of the capital stock of said Company issued and outstanding, viz:

Resolved: That the first paragraph of Article VI of the Articles of Incorporation of this Company as amended be further amended by striking from the third line thereof the word "eleven" and substituting therefor the word "twelve," so that the same as amended shall read:

"VI. The estate and affairs of the Consolidated Company shall be managed by a board of not less than three, nor more than twelve, directors, the number of whom shall be fixed from time to time by the By-Laws, and who shall elect from time to time a president, two or more vice-presidents, a treasurer, a secretary, and such other officers as may be provided for in the By laws of the Consolidated Company, and as may be determined by the said Board of Directors to be necessary or advisable."

[fol. 102] Further resolved That Mr. W. H. Bremner, President, or Mr. A. C. Doan, Secretary, or Mr. R. B. Alberson, Assistant Secretary of this Company, be and they are hereby authorized and directed to make, sign, verify and acknowledge any and all certificates required to be made and filed, or all notices required to be published, and to do any and all acts and things that may be necessary to carry into effect the foregoing amendment.

And we do hereby further accordingly certify that the Aritcles of Incorporation of the Minneapolis & St. Louis Railroad Company have been amended by herein set forth.

In witness whereof, we have made, signed, verified and acknowledged this certificate this 7th day of May, 1918.

W. H. Bremner, President. R. B. Alberson, Assistant Secretary. (Seal.)

STATE OF IOWA,
County of Polk, ss:

On the 7th day of May, 1918, before me personally appeared W. H. Bremner and R. B. Alberson, to me personally known, who being by me duly sworn, did depose and say that they are the President and Assistant Secretary respectively of the Minneapolis & St. Louis Railroad Company; That they had read the foregoing cerificate by them subscribed and knew the contents thereof; that the seal affixed to the foregoing instrument is the corporate seal of said corporation; and that said certificate was executed by them in behalf of said corporation and said seal affixed by authority and direction of its stockholders at the meeting referred to in said certificate; and said [fol. 103] W. H. Bremner and R. B. Alberson severally duly acknowledged the foregoing certificate by them subscribed to be true, as they verily believe.

Subscribed in my presence and sworn to before me this 7th day of May, A. D. 1918. Mary A. Kean, Notary Public in and for Polk County, Iowa. (Seal.)

POLK COUNTY, IOWA:

Filed for record at 3.04 P. M. May 7, 1918, book 27, page 3.
Chas. A. Guth, Recorder. H. Kern, Deputy.

STATE OF IOWA, ss:

Filed for record in the office of Secretary of State May 7, A. D. 1918, and recorded in book F-6, page 277.
W. S. Allen, Secretary of State.

Proof of publication filed May 30, 1918.

[fol. 104] And afterwards, to wit: on the 10th day of February, A. D. 1923, there was filed in the office of the Clerk of the District Court of the United States for the Northern Division of the Southern District of Illinois, a certain Intervention of Interstate Commerce Commission, which said Intervention was and is in the words and figures, following, to wit:

[fol. 105] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION

[Title omitted]

INTERVENTION OF INTERSTATE COMMERCE COMMISSION—Filed Feb. 10, 1923

To the Honorable the Judges of said Court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150 we hereby enter the appearance of the Interstate Commerce Commission, as a party respondent, in the above-entitled suit, and of ourselves as its counsel.

P. J. Farrell, R. G. Curry, E. M. Reidy, For Interstate Commerce Commission.

[File endorsement omitted.]

[fol. 106] And afterwards, to wit: on the 10th day of February, A. D. 1923, there was filed in the office of the Clerk of the District Court of the United States for the Northern Division of the Southern District of Illinois, a certain answer of Interstate Commerce Commission, which said answer of Interstate Commerce Commission, was and is in the words and figures, following, to wit:

[fol. 107] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed Feb. 10, 1923

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiff's bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraph 1 of the bill of complaint, the intervening defendant, Interstate Commerce Commission, hereinafter called the Commission, admits, for the purposes of this suit, that the allegations contained in said paragraph are true, except that it denies that said Service Order No. 37 was not made upon the petition of any party or parties in interest. In this connection the Commission alleges that said service order was made as a result of the Commission's investigation pursuant to a petition filed in its office by the Minneapolis & St. Louis Railroad Company.

[fol. 108] II

Answering paragraph 2 of the bill of complaint, the Commission admits that plaintiff is a railroad corporation incorporated under the general railroad act of Illinois on September 25, 1880, but disclaims information sufficient to form a belief as to whether the other allegations contained in said paragraph are, or as to whether any of said allegations is, true.

III

Answering paragraphs 3 to 9, inclusive, of the bill of complaint, the Commission alleges that the allegations contained in said paragraphs, except as hereinafter set forth, relate to matters which are incompetent, irrelevant and immaterial as applied to the issues in this suit. Therefore, the Commission neither admits nor denies said allegations, but leaves plaintiff to establish the truth of the same by competent proof if believed to be material and if plaintiff is permitted to do so by the court. In this connection the Commission alleges that plaintiff cannot, by entering into contracts with other common carriers, prevent the Commission from making and issuing orders such as its Service Order No. 37 under the authority conferred upon it by the Interstate Commerce Act and for the purpose of performing duties imposed upon the Commission by that Act. The Com-

mission admits and alleges that the rails of the Minneapolis & St. Louis Railroad Company do not connect directly with the rails of the railroads, other than the plaintiff, mentioned in paragraphs, and that through traffic moving from or to the rails of the Minneapolis & St. Louis Railroad Company at or near Peoria to or from the rails of said other railroads must be transported over the rails owned [fol. 109] or used by the plaintiff. The Commission further admits that it granted to plaintiff a special permission No. 54479 to file upon one day's notice plaintiff's tariff I. C. C. No. 36. For full and complete information as to the terms of this tariff the Commission refers the Court to a true copy thereof which is attached hereto as Exhibit A and made a part hereof. The Commission further admits that on April 13, 1922, it made its report and order in the proceeding, docket No. 13110, mentioned, and refers the court to said report and order, copies of which are attached as Exhibit 3 to the bill of complaint. The Commission admits that the plaintiff filed its tariff I. C. C. No. 40, and refers the court to a copy thereof, which is attached hereto as Exhibit B and made a part hereof. The Commission admits that it entered its opinion and order on December 22, 1922, in the second proceeding mentioned, and refers the court to a copy thereof, which is marked Exhibit 4 and attached to the bill of complaint.

IV

Answering paragraph 10 of the bill of complaint, the Commission disclaims information sufficient to form a belief as to whether the allegations of fact contained in said paragraph are, or as to whether any of said allegations is, true, except that the Commission denies that said Service Order No. 37 requires plaintiff to perform without compensation the services, or any of the services, referred to.

V

Answering paragraph 11 of the bill of complaint, the Commission admits that in the early days of January, 1923, the unwillingness or refusal of the plaintiff to longer continue to perform interchange service at and in the vicinity of Peoria between the Minneapolis & St. Louis Railroad Company and other carriers serving Peoria was brought to the attention of the Commission; that on January 5, 1923, Commissioner Aitchison, a member of the Commis- [fol. 110] sion, sent a telegram to the President of the plaintiff, a true copy of which is hereto attached as Exhibit C and made a part hereof as if herein set forth at length; that said telegram was sent in response to a telegram from said President to the Secretary of the Commission, dated January 4, 1923, a true copy of which is hereto attached as Exhibit D and made a part hereof, as if herein set forth at length. As to the other allegations of said paragraph 11 of the bill of complaint the Commission disclaims information sufficient to form a belief as to the truth thereof.

VI

Answering paragraph 12 of the bill of complaint, the Commission, on information and belief, admits that after said telegram was sent by Commissioner Aitchison, informal conferences were had by counsel for the plaintiff, among others, with members of the Commission, and that subsequently and on, to wit, January 16, 1923, notice was given by plaintiff to the Commission and to the Minneapolis & St. Louis Railroad Company that unless payments claimed by the plaintiff from the Minneapolis & St. Louis Railroad Company were made promptly, the plaintiff would discontinue to interchange freight traffic between the Minneapolis & St. Louis Railroad Company and other carriers at and in the vicinity of Peoria, on and after 12 M, January 20, 1923. As to the truth of the other allegations in said paragraph 12, the Commission disclaims information sufficient to form a belief.

VII

Answering paragraph 13 of the bill of complaint, the Commission admits and alleges that a petition was filed with it by the Minneapolis & St. Louis Railroad Company on, to wit, January 6, 1923, and that thereafter on, to wit, January 8, 1923, an informal conference was [fol. 111] held by Division 5 of the Commission, at which counsel for the plaintiff and counsel for said Minneapolis & St. Louis Railroad Company were present, and that at this time the matter of the controversy between the plaintiff and the Minneapolis & St. Louis Railroad Company was gone into thoroughly and an effort was made by the Commission to bring about an amicable settlement without interrupting the flow of traffic into and through Peoria and the vicinity thereof. The Commission at this conference pointed out that it had already entered its order in docket No. 14534, a copy of which order is attached to the bill of complaint as Exhibit 5, with a view to effecting a reasonable adjustment of rates, divisions and charges as between the carriers in and in the vicinity of Peoria. The Commission further alleges that its Service Order No. 37 was made and served upon plaintiff in accordance with the authority conferred and duties imposed upon the Commission by paragraph (15) of section 1 of the Interstate Commerce Act, which is an emergency paragraph and authorizes the making and service of such orders without the holding of formal hearings.

VIII

Answering paragraph 14 of the bill of complaint, the Commission admits that it made and entered its service order No. 37, and admits that the tariff referred to is in effect and on file in the Commission's office, but the Commission denies each of and all the other allegations contained in said paragraph, and in particular denies that by said order plaintiff is required to handle traffic without compensation.

IX

Answering paragraph 15 of the bill of complaint, the Commission calls attention to the fact that this paragraph contains only con-
[fol. 112] clusions of law, and therefore the Commission neither admits nor denies any of the allegations therein contained.

X

Answering paragraph 16 of the bill of complaint, the Commission says that the allegations therein contained purport to state provisions of the statutes of the United States and the Commission, therefore, neither admits nor denies the same.

XI

Answering paragraph 17 of the bill of complaint, the Commission denies that, as alleged in said paragraphs, it issued a pretended service order, but admits that it made an order in the proceeding mentioned, and refers the court to said order, copy of which is attached as Exhibit 5 to the bill of complaint.

XII

Answering paragraph 18 of the bill of complaint, the Commission denies each of and all the allegations therein contained.

XIII

Answering paragraph 19 of the bill of complaint, the Commission denies that said Service Order No. 37 is illegal. On the contrary the Commission alleges that said order was made and served upon plaintiff in accordance with the authority conferred upon the Commission by the Interstate Commerce Act, including paragraph (15) of section 1 of said Act, and for the purpose of performing a duty imposed upon the Commission by that act.

Except as herein expressly admitted, the Commission denies the truth of each of and all the material allegations of fact contained in [fol. 113] the bill of complaint, in so far as they are inconsistent or in conflict with the denials and the allegations contained in this answer.

All of which matters and things the Commission is ready to aver, maintain and prove as this honorable court shall direct and hereby prays that said bill of complaint may be dismissed.

Interstate Commerce Commission, By R. G. Curry, E. M. Reidy. P. J. Farrell, Of Counsel.

City of Washington,
District of Columbia, ss:

Clyde B. Aitchison being duly sworn, deposes and says that he is a member of the Interstate Commerce Commission, the above-named

defendant, and makes this affidavit on behalf of said Commission; that he has read the foregoing answer and knows the contents thereof, and that the same is true.

Clyde B. Aitchison.

Subscribed and sworn to before the undersigned, a notary public within and for the District of Columbia this 1st day of February, 1923. Alfred Holmead, Notary Public. (Seal.)

[fol. 114] EXHIBIT A TO ANSWER OF I. C. C.

Tariff I. C. C. No. 36

Peoria and Pekin Union Railway Company switching tariff, Naming intermediate switching rates on all freight cars coming from or destined to points beyond the Peoria Pekin Switching district regardless of origin or destination, except empties on which this company receives a loaded haul one way. Intermediate Service only.

Apply following rates in dollars and cents per car:

Between—	And—	Rate per car
Track connection with Minneapolis & St. Louis Railroad.	Peoria and Pekin Union Railway Company tracks in East Peoria Yards.	$4.00 (See Note.)

NOTE.—Will not apply to switching service for tenant companies under tenancy contracts.

Issued upon one day's notice as per Interstate Commerce Commission Special Permission No. 54479, dated August 26, 1921, and I. C. C. Tariff Circular 18A, Rule 58.

Effective August 30, 1921.

Issued by—

E. F. Stock, General Freight and Passenger Agent.

Issued August 27, 1921.

[fol. 115] EXHIBIT B TO ANSWER OF I. C. C.

I. C. C. No. 20. I. C. C. No. 40

No supplement to this tariff will be issued except for the purpose of canceling the tariff.

Peoria and Pekin Union Railway Company in Interchange switching tariff, naming intermediate switching rates on all freight cars from and to points beyond the Peoria-Pekin Switching district (*) regardless of origin or destination, except empties on which this company receives a loaded haul one way. Intermediate Service only.

Apply following rates in dollars and cents per car:

Between—	And—	Rate per car (A) (See note)
Track connection with Chicago, Burlington & Quincy Railroad Company.	Peoria and Pekin Union Railway Company track connections, with connecting lines in East Peoria Yards.	$3.00
Track connection with The Chicago, Rock Island and Pacific Railway Company.	Peoria and Pekin Union Railway Company track connections, with connecting lines in East Peoria Yards.	$3.50
Track connection with Peoria Railway Terminal Company at Iowa Junction.	Peoria and Pekin Union Railway Company track connections, with connecting lines in East Peoria Yards.	$4.00
	Peoria and Pekin Union Railway Company track connection with Chicago and Northwestern Railway Company in Adams St. Yards.	$2.50
Track connection with Illinois Traction System.	Peoria and Pekin Union Railway Company track connections, with connecting lines in East Peoria Yards.	$4.00

NOTE:—Will not apply to switching service rendered tenant companies under tenancy contracts.

The Tenant Companies are:

The Chicago and Alton Railroad Company.
Chicago, Peoria and St. Louis Railroad Co. (Bluford Wilson and William Cotter, Receivers).
The Cleveland, Cincinnati, Chicago and St. Louis Railway Company.
Illinois Central Railroad Company.
The Pittsburgh, Cincinnati, Chicago and St. Louis Railroad Company.

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*For description Peoria-Pekin Switching District see Agent E. B. Boyd's Tariff 152—C. I. C. C. No. A-1260, Ill. C. C. 115, (Item 65), supplements thereto or reissues thereof. (A) Advance.

Chicago and Northwestern Railway Co.
The Lake Erie and Western Railroad Co.
Toledo, Peoria and Western Railway Co. (Samuel M. Russell, Receiver).
Issued in compliance with Interstate Commerce Commission Order April 13, 1922, in Case 13,110.
Effective July 1, 1922.
Issued by—

E. F. Stock, G. F. & P. A., Peoria, Illinois.

Issued May 27, 1922.

[fol. 116] EXHIBIT C TO ANSWER OF I. C. C.

Telegraph Blank

For Government Business Only.

Interstate Commerce Commission

Washington

V. V. Boatner, January 5, 1923.
Peoria and Pekin Union Railway,
Peoria, Illinois:

Telegram to Secretary McGinty today. Order against Peoria and Pekin Union Railway still stands unrescinded with finding that its tariff on traffic interchanged with Minneapolis and St. Louis Railway is unduly prejudicial so long as Burlington and Rock Island are preferentially treated. Period. Commission is firmly of opinion that traffic through Peoria gateway must be kept moving in the public interest and desires assurances from you that there will be no interruption pending orderly disposition of any questions disputed between your company and common carriers connecting with you. Please answer.

Clyde B. Aitchison, Chairman Division 5.

Charge Government Rates; payable at office of Commission at Washington.

[fol. 117] EXHIBIT D TO ANSWER OF I. C. C.

Western Union Telegram

Newcomb Carlton, President. George W. E. Atkins, First Vice President

Received at Commercial Nat'l Bank Bldg., 14th & G Sts. N. W., Washington, D. C.

1923, Jan. 4, P. M. 6.50.

AA418 CAK.
UD Peoria, Ill. 4 436 P.

G. B. McGinty,
Secretary Interstate Commerce Commission, Washington, D. C.:

Commission decision I and S. Docket Fifteen Ninety Six original report thirteen one ten stop Minneapolis and St. Louis Railroad Company advises in view of such decision it refuses to make further payments to Peoria and Pekin Union Railway Company of charges named in tariff Eye See See number Thirty Six or any other tariff carrying charges on traffic interchanged at Peoria with tenant lines of Peoria and Pekin Union Railway Company stop This Company construes decision of Commission to dismiss complaint of Minneapolis and St. Louis Railroad Company leaving tariff Eye See See number thirty six in full force and effect and stands ready and willing to accept all traffic offered in interchange on basis such tariff and has notified Minneapolis and St. Louis Railroad Company that unless settlements for handling of the traffic interchanged are made upon same basis heretofore existing it would be necessary to place that company upon cash basis requiring payment of tariff charges when cars are offered in interchange stop This for information of Commission concerning situation at Peoria stop

V. V. Boatner, P. and P. U. Ry.

[File endorsement omitted.]

[fol. 118] And afterwards, to wit: on the 10th day of February, A. D. 1923, there was filed in the office of the clerk of the District Court of the United States for the Northern Division of the Southern District of Illinois, two certain certified copies of telegrams, V. V. Boatner to Commissioner Aitchison, dated January 6th and 16th, 1923, respectively, which said certified copies are in the words and figures, following, to wit:

[fol. 119] Exhibit in Evidence—Filed Feb. 10, 1923

Interstate Commerce Commission

Washington

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is a true copy of telegram dated Peoria, Ill., January 6, 1923, addressed to Clyde B. Aitchison, Interstate Commerce Commission, Washington, D. C., signed V. V. Boatner.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 8th day of February A. D. 1923.

George V. McGinty, Secretary of the Interstate Commerce Commission. (L. S.)

Western Union Telegram

Newcomb Carlton, President. George W. E. Atkins, First Vice President

Received at Commercial Nat'l Bank Bldg., 14th & G Sts. N. W., Washington, D. C.

1923, Jan. 6th, P. M. 5.54.

AA358 CAK.
UD Peoria Ill. 6 400P.

Clyde B. Aitchison:

Interstate Commerce Commission Washington DC your wire fifth controversy this company with Minneapolis and St Louis assure you I am in hearty sympathy with Commission opinion that traffic should not be interrupted however Minneapolis and St. Louis have notified me that they will refuse to pay charges on basis or existing tariff lawfully in effect since Commission's order of December twenty second dismisses complaint of Minneapolis and St Louis in docket one three one one naught in which discrimination was suggested Cannot understand how there is now any existing discrimination order against Peoria and Pekin Union Respectfully suggest that present status with Minneapolis and St Louis which in practical effect has existed for nearly forty years should be continued Pending general investigation Mr. Fletcher legal counsel for this company in this matter will call on you Monday January eighth and explain our position more fully

V. V. Boatner.

[File endorsement omitted.]

[fol. 120] Interstate Commerce Commission

Washington

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is a true copy of telegram dated Peoria, Ill., January 16, 1923, addressed to Hon. Clyde B. Aitchison, I. C. C. Washington, D. C., signed V. V. Boatner.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 8th day of February A. D. 1923.

George B. McGinty, Secretary of the Interstate Commerce Com. (L. S.)

Western Union Telegram

New Interior Building

Franklin 7100; Branch 47

C2W MB CAK.

UD Peoria, Ill., 10.23 A. Jan. 16, 1923.

Hon. Clyde B. Aitchison,
I. C. C., Washington, D. C.:

Refer message sixth and Fletcher's conference with your division stop Minneapolis and St Louis Railroad still declines to make payments in accordance with tariff on file stop I have today served notice on Minneapolis and St Louis Railroad that unless payments are made as heretofore covering charges for intermediate switching performed by this company in accordance with tariff now on file with Commission that on and after twelve noon Saturady January twentieth this company will accept only such cars for delivery to connections upon the payment of such charges in advance by the Minneapolis and St Louis Company stop This company stands ready to accept and handle all traffic promptly when offered in interchange or otherwise but cannot undertake to perform service without compensation stop and in violation of tariff stop this for your information stop

V. V. Boatner.

[File endorsement omitted.]

[fol. 121] And afterwards, to wit: on the 10th day of February, A. D. 1923, there was filed in the office of the clerk of the district court of the United States for the Northern Division of the Southern District of Illinois, a certain answer of the Minneapolis & St. Louis Railroad Company, intervening defendant herein, which said answer was and is in the words and figures, following, to wit:

[fol. 122] In the District Court of the United States for the Southern District of Illinois, Northern Division

[Title omitted]

Answer of the Minneapolis & St. Louis Railroad Company—Filed Feb. 10, 1923

To the Honorable District Court of the United States in and for the Southern District of Illinois:

The Minneapolis & St. Louis Railroad Company, a Corporation, being a party in interest in the proceeding before the Interstate Commerce Commission, in which the order complained of by plain-

tiff in its original bill was entered, hereby appears as a party defendant to the above entitled cause, and files this, its answer to the original bill of the above named plaintiff, and alleges:

Paragraph 1. The defendant denies the allegation in the plaintiff's bill that service order No. 37 therein referred to, was not entered upon the application of any party, and alleges the fact to be, that the same was entered in connection with the proceeding instituted by The Minneapolis & St. Louis Railroad Company in the proceeding known as The Minneapolis & St. Louis Railroad Company, vs. Peoria & Pekin Union Railway Company, pending before the Interstate Commerce Commission and known as Docket Number 13110, and upon the petition of The Minneapolis & St. Louis Railroad Company filed January 6th, 1923, asking for the exercise of the emergency powers of the Commerce Commission for the purpose of preventing the interruption of the flow of interstate commerce through Peoria, a copy of which application is attached to this Answer marked Exhibit "A" and asked to be made a part hereof.

This defendant further shows to the Court that it is a corporation organized and existing under the laws of the State of Iowa, with its principal place of business in the City of Des Moines, and that it is a citizen and resident of the State of Iowa and of the Southern District thereof.

[fol. 123] This defendant further shows to the Court that by reason of the fact that the order of which the plaintiff complains, was entered upon the application of The Minneapolis & St. Louis Railroad Company, a Corporation a resident of the Southern District of Iowa, the Plaintiff is not entitled to maintain this action in the District Court of the United States in and for the Southern District of Illinois, and the said Court is without jurisdiction to hear and determine the same.

Paragraph 2. The defendant alleges that the plaintiff, Peoria & Pekin Union Railway Company is a corporation organized under the laws of the State of Illinois for the purpose of the operation of a railroad, and that the same was organized in October 1880, by the railroad companies named in Paragraph 3 of the plaintiff's bill, each of which lines at that time owned or operated railways entering the City of Peoria, Illinois, and terminal facilities therein. That the said plaintiff railway company was organized by said companies for the purpose of consolidating the terminal facilities of the companies organizing the same and to provide a means for the joint operation thereof, and the acquisition of terminal facilities within the City of Peoria by the Peoria & Pekin Union Railway Company at that time was effected as a means of carrying out the aforesaid purpose to jointly operate the said terminal facilities.

That the aforesaid organizing companies of the Peoria & Pekin Union Railway Company collectively own all of the stock of the said corporation and since that time, in addition to their successors in interest as alleged in Paragraph 3 of the plaintiff's bill, the Chicago & Northwestern Railway Company and the Lake Erie & West-

ern Railroad Company have acquired stock therein which, together with the Chicago, Peoria & St. Louis Railroad Company, the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company, the Toledo, Peoria & Western Railroad Company, and the Illinois Central Railroad Company, now own collectively the entire capital stock thereof in proportions unknown to this defendant.

The defendant further alleges that for the purpose of effecting the joint operation of terminal facilities within the City of Peoria, the said Peoria & Pekin Union Railway Company did also enter into contracts of tenancy with each of its organizing lines and has since said time entered into a similar contract with each of the aforesaid companies which have become interested as stockholders therein and has likewise entered into contracts of tenancy with the Chicago [fol. 124] & Alton Railroad Company and the Pittsburgh, Chicago, Cincinnati & St. Louis Railroad Company, which companies, however, have acquired no interest as stockholders in the plaintiff company.

Paragraph 3. That the contract entered into between the Peoria & Pekin Union Railway Company with each one of the proprietary tenant companies, is the same as with each of the other of such proprietary tenants, and except as to certain provisions relating to the management of the affairs of said railway company, is the same as the contract entered into with the Chicago & Alton Railroad Company and the Pittsburgh, Chicago, Cincinnati & St. Louis Railroad Company. A Correct copy of said contract, referred to by the plaintiff as the general contract is attached to its bill.

Paragraph 4. The defendant further alleges that none of said companies referred to as the tenants of the plaintiff company at Peoria have rails extending into said city or terminal facilities therein, but that each and all of them have acquired by virtue of the contract heretofore referred to, the right to use in common with each of the others all of the terminal facilities in the cities of Peoria or Pekin owned by the above named plaintiff for the purpose of the interchange of cars between said tenant company and industries located upon the tracks of the plaintiff company and also for the purpose of interchange of cars between such tenant companies and the lines of other railroads in the City of Peoria, which may at any time be connected with the rails of the plaintiff.

Paragraph 5. That each of the railroad companies which are operating as tenants of the plaintiff company have accepted charters from the states in which they were respectively organized, authorizing them and each of them to operate a railroad to, into or through the City of Peoria, Illinois. That each of said companies have accepted the charter powers so vested in them respectively and pursuant thereto have undertaken to exercise the same and operate their respective lines into the city of Peoria, and pursuant thereto have published tariffs and have held themselves out to the public indicating that their respective railroads are operating into or through the City of Peoria. That except for the rights

granted in the contract entered into between the said tenants and the plaintiff, none of the said railroad companies can operate a railroad into or through the City of Peoria, but that each and all of [fol. 125] them have exercised the rights granted by said contract to reach the City of Peoria and were at the time this controversy arose, and are now, operating their respective railroads into the City of Peoria as by the terms of their charters they were bound to do. That by reason thereof, each of said tenants was bound to provide terminal facilities to enable them to receive and deliver freight and to interchange the same with other railroads and elected to do so by entering into the contract heretofore referred to by which each of them was granted the right to use in common with each of the others all the terminal facilities in the City of Peoria, of this plaintiff.

Paragraph 6. That prior to April 1, 1921, this defendant and its predecessor in interest, the Iowa Central Railroad Company by contract operated and used the terminal facilities of the plaintiff company in the City of Peoria as a tenant, the terms of which contract conformed substantially to the terms of the contract between the plaintiff and each of its other tenants. The defendant, alleges, however, that through a long period of years the plaintiff failed to carry out the obligations of the said contract, failed to provide terminal facilities where the trains of this defendant could be broken up upon arrival at Peoria or made up for the purpose of departure therefrom, failed to provide the switch engines and crews which it was contemplated by the contract should be furnished by it, failed to make up trains for this defendant, so that freight tendered to it by the other lines entering Peoria could be promptly moved out over its lines, failed to pro-vide roundhouse facilities for its engines, and generally failed to carry out the obligations of its contract, with the result that this defendant was compelled to and did expend large sums of money in constructing side tracks, yard tracks, turn outs, switches, roundhouse, coal chute, water system and other facilities necessary for the purpose of the operation of a railroad at a terminal, so that at the time of the acts hereinafter referred to, this defendant had in the city of Peoria sufficient terminal facilities for the handling of its business in interchange with the tenants of the plaintiff and other railroads, and was enabled upon the facilities possessed by it, to receive cars for shipment upon its own tracks and to make up its trains in its own yards in the City of Peoria, and was operating switch engines and switch crews for the purpose of effecting delivery of cars of freight arriving over its line at Peoria to other railroads at said place or to industries therein.

[fol. 126] Paragraph 7. That on April 1, 1921, the period of time during which this defendant had agreed to remain as a tenant of the plaintiff and use its terminal facilities as such, expired and by reason of the foregoing failure on the part of the plaintiff to fulfill the obligations of said contract, the defendant failed to renew the same or to remain longer as a tenant.

Paragraph 8. That the line of this defendant extends into the City of Peoria and connects with the track of the plaintiff, Peoria & Pekin Union Railway Company, at a point in said city known as Iowa Junction, and the defendant alleges the fact to be that by virtue of the contract existing between the plaintiff and its tenant lines, by which each of the said tenants is given the right to use all the facilities of the plaintiff which are necessary for the interchange of cars with this plaintiff, it connects with the lines and terminal facilities of each of the said tenants, as the same is defined by the Act to Regulate Commerce and acts amendatory thereto.

Paragraph 9. The defendant further alleges that both prior and after April 1, 1921, it had in connection with the tenants of the plaintiff company, established through routes and joint rates for the transportation of property by this defendant and the tenants of the plaintiff from points on or beyond the line of this plaintiff to points on or beyond the lines of the said tenants, or in the reverse direction and that it had agreed with said tenants upon a division of such joint rates which was not prejudicial to any of the carriers involved therein.

The defendant further alleges the fact to be that since the expiration of the term of tenancy of the plaintiff the said tenants did continue to designate a track upon which they and each of them would receive from this defendant cars in interchange, moving through Peoria to points on or beyond their respective lines, which designated track for the receipt of such cars was upon the property of the plaintiff company. The defendant alleges that pursuant to such designation it did deliver upon the track so designated, up until about the 15th of August, 1921, without the imposition of any charge therefor, cars destined for transportation beyond Peoria over the line of the said tenants, and that the track so designated by the tenants or by the plaintiff company acting on behalf of said tenants, was a track which under the terms of the contract between the plaintiff and its tenants, each of such tenants had the right to use for the purpose of receipt or delivery of cars.

[fol. 127] The defendant alleges the fact to be that none of the tenants of the plaintiff company have terminal facilities within the City of Peoria or own lines of railroad extending therein except as a result of the exercise by the said tenants of the right to use the facilities of the plaintiff pursuant to the terms of said contract, and the defendant alleges that each of the said tenants has exercised the right to use the tracks as provided in said contract of tenancy and by virtue thereof each of the said tenants has published tariffs in which Peoria, Illinois, is named as a station upon their respective lines, and that the terminal facilities of the plaintiff in the said City of Peoria are by virtue of the said contract, in fact the terminal facilities of each of the said tenant lines.

Paragraph 10. The defendant denies that service order No. 37, of which complaint is made, deprives the plaintiff of his property without due process of law or requires it to permit this defendant to use

its property without compensation, for that in the receipt of cars tendered by this plaintiff to its tenants or by delivery of cars tendered by its tenants to this plaintiff, this plaintiff is acting merely as the agent of the said tenants and in discharging the duty which each of the said tenants owes to the public of receipt and delivery of cars at such places and upon such tracks as each of them have, under the contracts of tenancy, the right to do. And the defendant further alleges that for all services performed on behalf of the tenants in the receipt or delivery of cars at the station of Peoria, which each of the tenants has, by the publication of tariffs, obligated itself to serve, the plaintiff has the right, under the terms of each of the contracts of tenancy, to charge and receive from each of the tenants a reasonable compensation for such service. The defendant denies that any service rendered by the plaintiff or tendered by it to each of the tenants or in delivering cars to this defendant which have been transported into the city of Peoria by any of the tenants, is for the benefit of this defendant, but on the contrary that such transfer service is made necessary to be performed by the plaintiff by reason of the fact that each of the tenant lines has, by entering into the contract of tenancy, elected to use the terminal facilities of the plaintiff as a substitute for terminal facilities which each would otherwise have to provide, and is the performance by the plaintiff of the obligation assumed by each of the tenants when they entered into the contract of tenancy with the plaintiff and published tariffs declaring to the public that Peoria, Illinois, was a station upon their respective lines.

[fol. 128] Paragraph 11. That on August 15, 1921, the plaintiff refused to accept cars tendered by this defendant to the tenants of the plaintiff and refused to deliver cars to this defendant which had been transported into Peoria over the lines of said tenants. That the refusal of the plaintiff so to do resulted in a congestion of the terminal properties of this defendant and the defendant did file its bill in equity in the District Court of the United States, in and for the Southern District of Illinois, asking for the issuance of a temporary injunction, enjoining the plaintiff and each of its tenants from further violation of their respective duties as common carriers, and upon the filing of the bill, a restraining order by the Hon. Lewis Fitzhenry, Judge of the District Court of the United States in and for the Southern District of Illinois, was issued, commanding the plaintiff to receive and deliver cars in interchange between this plaintiff and its respective tenants. In the said bill this defendant prayed that an interlocutory injunction issue and that prior to the date set by the said court for a hearing thereon, the plaintiff did file with the Interstate Commerce Commission its tariff known as I. C. C., No. 36, effective under special permission of the said commission upon one day's notice, in which it was provided that a charge of Four Dollars ($4.00) per car would be made for the movement of cars between the point of connection between the rails of this defendant and the plaintiff and the point in East Peoria at which the plaintiff made up the trains for its tenants. That by reason of the filing of the said tariff the plaintiff and its co-defendants in that proceeding, being its

tenants, filed a motion to dismiss the bill of this defendant upon the ground that inasmuch as the tariff had been filed providing that a charge would be made for the said movement, the court was without jurisdiction to determine the validity or reasonableness thereof or the question of whether the same was unlawfully discriminatory and upon said ground the court did order the bill dismissed for want of jurisdiction. That a true copy of the order dismissing the said cause is set forth in the plaintiff's bill.

Paragraph 12. That because of the dismissal of the bill for want of jurisdiction, this defendant did file with the Interstate Commerce Commission its complaint, which was docketed by the said commis-[fol. 129] sion as No. 13110, in which it was claimed that the plaintiff by reason of its relation to its tenants and the fact that its tenants owned no terminal facilities within the City of Peoria, but that they had the right to use those belonging to the plaintiff, was the agent of said tenants for the purpose of effecting interchange of cars between them and other railroads in Peoria and therefore said tariff was invalid, and in which it was further claimed that the tariff unlawfully discriminated against this defendant because of the fact that no similar charge was sought to be imposed upon traffic interchanged between the Chicago, Rock Island & Pacific Railway Company and the tenants of plaintiff, or upon traffic interchanged between the Chicago, Burlington & Quincy Railroad Company and the tenants of the plaintiff, which companies, the Chicago, Rock Island & Pacific and the Chicago Burlington & Quincy, were not tenants of the plaintiff company and which were, in so far as the interchange of traffic between them respectively and the respective tenants of the plaintiff, in a situation similar to that of this defendant.

That said complaint came on for hearing before the said commission and on April 13, 1922, the said commission filed its order finding that the said tariff did unlawfully discriminate against this defendant, a copy of which finding and order is attached to plaintiff's bill and contains the following: "We are of the opinion and find that the charges under consideration are unjustly discriminatory and unduly prejudicial against the complainant." Pursuant to this finding this plaintiff was ordered to remove the said discrimination on or before July 13, 1922.

The defendant further alleges that the plaintiff in an attempt to comply with the order of the commission to remove the discrimination therein found to exist, did publish a certain tariff, known as I. C. C., No. 40, in which there was sought to be imposed against the Chicago, Rock Island & Pacific Railway Company and the Chicago, Burlington & Quincy Railroad Company charges upon traffic interchanged between the said companies and the tenants of the plaintiff. That upon protest of the said Chicago, Rock Island & Pacific Railway Company and the Chicago, Burlington & Quincy Railroad Company, the tariffs were suspended and upon a hearing duly had, the commission entered its order finding that the imposition of any charge against said companies was unlawful and an order entered in said proceeding cancelling the same.

[fol. 130] The defendant further alleges that the order of April 13, 1922, directing the plaintiff to remove the unlawful discrimination found to exist because of the imposition of charges under the terms of the tariff I. C. C. No. 36, has never been notified or withdrawn and is still in force and effect. The defendant alleges the fact to be, however, that the plaintiff has never cancelled the said charges notwithstanding the fact that the Interstate Commerce Commission in the proceeding just referred to has ordered that tariffs proposed by the plaintiff against the Chicago, Rock Island & Pacific Railway Company and Chicago, Burlington & Quincy Railroad Company, for the purpose of removing the discrimination and complying with the order of April 13, be cancelled, by reason of which the commission has found that the unlawful discrimination found by the order of April 13, cannot be removed by imposing similar charges against the other companies similarly situated, and that therefore the said order can be complied with only by cancelling the charges provided for in I. C. C. No. 36, which plaintiff seeks to impose upon and collect from this defendant.

Paragraph 13. The defendant further alleges the fact to be that after the finding by the Interstate Commerce Commission of December 22, 1912, wherein it was found that the plaintiff had no right to impose charges against the Chicago, Rock Island & Pacific Railway Company and the Chicago, Burlington & Quincy Railroad Company, on account of cars interchanged between the said companies respectively and the tenants of the plaintiff, this defendant demanded of the plaintiff that it comply with the order of April 13 and remove the unlawful discrimination which by said order was found to exist. That the plaintiff refused so to do and insisted upon its right to collect the said charges, whereupon this defendant refused to pay the same, and that as a result of such refusal the plaintiff threatened and so advised this defendant and the Interstate Commerce Commission that unless the charges were paid as by said tariff provided, it would refuse to receive or deliver cars from or to this defendant for the purpose of interchange between it and the tenants of the plaintiff. Thereupon on January 6, 1923, the defendant filed with the Interstate Commerce Commission its petition, calling to the attention of the Commission the threat of the plaintiff to interrupt the flow of interstate commerce, pursuant to which the said commission issued service order No. 37, of which the plaintiff complains.

Paragraph 14. The defendant alleges the fact to be that said [fol. 131] service order No. 37, was within the powers of the commission conferred upon it by the Act of Congress known as the Act to Regulate Commerce, February 4, 1887 and acts amendatory thereof, because of the fact that the threat of plaintiff to refuse to receive or deliver cars from or to this defendant would result in a congestion of traffic at Peoria and if continued would result in complete inability on the part of the defendant to operate its railroad or to transport freight into the City of Peoria. That such interruption of traffic and resulting inability of this defendant to operate its railroad would interfere with the flow of interstate commerce

for the reason that practically all of the traffic handled by this defendant in interchange with the tenants of the plaintiff is moving in interstate commerce. The defendant avers the fact to be that such a condition or congestion or threatened congestion constituted an emergency within the meaning of Paragraphs 15 and 16 in Section 1 of the Act to Regulate Commerce, and by reason thereof the commission was empowered upon complaint without notice or hearing, to make such an order as in its judgment would prevent the interruption of traffic and prevent injury to the public by the interruption or congestion of the flow of interstate commerce.

The defendant further avers the fact to be that by virtue of order No. 14534 which is referred to in the plaintiff's bill there is now pending before the Interstate Commerce Commission all the mat-ers presented by the complaint of this defendant filed in docket No. 13110 in which there will be determined by the commission the question of the right of this plaintiff to impose any charges against this defendant or any other party for the services which it alleges in its bill it is performing for this defendant. That the date of February 20, 1923, has been fixed by the commission as the date for hearing of said matter.

Paragraph 15. The defendant further alleges that by reason of the foregoing, the Order No. 37, was not beyond the power of the commission, and is not void by reason of the fact that the threat of the plaintiff to interrupt the flow of interstate traffic constituted an emergency which the commission was authorized by the Act to Regulate Commerce to prevent, and that it has jurisdiction to determine the matter of the compensation and by whom it is to be paid, to which the plaintiff may be entitled for the service performed.

Paragraph 16. The defendant further alleges the fact to be that [fol. 132] by reason of the facts herein alleged, to-wit, that it is the mere agency in performing the terminal services which its tenants are unable to perform except through the exercise of rights granted by their tenancy contracts, it is the mere agent of the said tenants and in effecting such interchange it is performing a duty imposed by law upon such tenants and that, having the right under the said contract to recover from said tenants a reasonable compensation therefor, it is not being deprived of its property without due process or being required to perform services for this defendant without compensation. That by reason of the foregoing, the property of the plaintiff is not taken for public use without compensation and the said order is valid and binding.

Paragraph 17. The defendant further alleges the fact to be that the tariff I. C. C., No. 36, under which the charges are sought to be imposed and collected by the plaintiff from this defendant, is invalid for the reason that no services are performed in effecting the interchange between the defendant and the tenants of the plaintiff for this defendant, and that the plaintiff has no right as the agent of its tenants and in performing the duty of receipt and delivery of freight assumed by them, to collect compensation therefor from this defendant or from the public.

Paragraph 18. This defendant denies each and every allegation contained in the original bill filed by plaintiff except such as by the allegations hereinbefore referred to are expressly admitted or qualified.

Wherefore, the defendant prays that the petition of the plaintiff be dismissed.

The Minneapolis & St. Louis Railroad Company, By W. H. Bremner, President. M. M. Joyce, Donald Evans, S. F. McGrath, Solicitors for Minneapolis & St. Louis Railroad Co., Defendant.

[fol. 133] STATE OF IOWA,
Polk County, ss:

I, W. H. Bremner, being first duly sworn, on oath depose and say that I am the President of The Minneapolis & St. Louis Railroad Company, the defendant in the foregoing entitled action; that I have read the foregoing answer of The Minneapolis & St. Louis Railroad Company, defendant herein, and that I am familiar with all the facts therein alleged and all the allegations therein contained are true as I verily believe.

W. H. Bremner.

Subscribed and sworn to before me this 5th day of February 1923. Clifford V. Cox, Notary Public in and for Polk County, Iowa. (L. S.)

[fols. 134-137] EXHIBIT "A" TO ANSWER OF M. & ST. L. R. R. CO.

BEFORE THE INTERSTATE COMMERCE COMMISSION

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Complainant,

vs.

PEORIA & PEKIN UNION RAILWAY COMPANY, Respondent.

COMPLAINT AND APPLICATION [Omitted; printed title p. 71]

[fol. 138] [File endorsement omitted.]

[fol. 139] And afterwards, to wit: on the 10th day of February, A. D. 1923, there was filed in the office of the Clerk of the District Court of the United States for the Northern Division of the Southern District of Illinois, a certain motion for leave to amend the bill of complaint herein, which said motion, was and is in the words and figures, following, to wit:

[fol. 140] DISTRICT COURT OF UNITED STATES, SOUTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION

[Title omitted]

MOTION FOR LEAVE TO AMEND BILL OF COMPLAINT—Filed Feb. 10, 1923

Now comes Plaintiff in the above-styled cause and moves the Court for permission to amend its Bill so as to contain a recital that answer under oath is waived.

F. J. Quinn, Horton & McLaughlin, R. V. Fletcher, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 141] And afterwards, to wit: on the 10th day of February, A. D. 1923, the following further proceedings were had in said Court in said cause and were entered of record, to wit:

[fol. 142] IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION

[Title omitted]

ORDER GRANTING LEAVE TO AMEND BILL OF COMPLAINT—Filed Feb. 10, 1923

On motion of the Plaintiff in this cause, it is ordered that the Plaintiff be permitted to file an amendment to his Bill, providing that answer under oath is waived.

Motion Allowed.

[File endorsement omitted.]

[fol. 143] And afterwards, to wit: on the 10th day of February, A. D. 1923, there was filed in the office of the clerk of the District Court of the United States for the Northern Division of the Southern District of Illinois, a certain Amendment to Bill of Complaint, which said amendment was and is in the words and figures, following, to wit:

[fol. 144] IN THE DISTRICT COURT OF THE UNITED STATES, SOUTH-DISTRICT OF ILLINOIS, NO-THERN DIVISION

[Title omitted]

AMENDMENT TO BILL OF COMPLAINT—Filed Feb. 10, 1923

Now comes the Plaintiff and by leave of the court first had and obtained, amends the Bill of complaint heretofore filed in this case, by adding at the end thereof, the following:

"Answer under oath being expressly waived."

Peoria & Pekin Union Railway Company, By V. V. Boatner, President. R. V. Fletcher, F. J. Quinn, Horton & McLaughlin, Counsel.

[File endorsement omitted.]

[fols. 145 & 146] And afterwards, to wit: on the 19th day of February, A. D. 1923, there was filed in said cause, the opinion of the court, which said opinion was and is in the words and figures, following, to wit:

[fol. 147] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION

[Title omitted]

Before Page, Cir. J., and English and Fitzhenry, Dist. JJ.

OPINION BY PAGE, Cir. J.—Filed Feb. 19, 1923

The prayer of the petition is that plaintiff may be granted a temporary injunction, restraining the Interstate Commerce Commission and the United States from enforcing the terms of Service Order No. 37, and that upon a final hearing the order may be cancelled. The part of the order complained of reads:

"That the Peoria & Pekin Union Railway Company shall with reasonable promptness and diligence continue to interchange freight traffic between the Minneapolis & St. Louis Railroad Company and connecting carriers at the regularly established interchange points at and in the vicinity of Peoria Ill."

The United States filed an answer, among other things urging that the order appeared to have been entered upon a petition of the Minneapolis & St. Louis Railroad Company, a corporation with its residence in the judicial district for the southern district of Iowa, and alleged that the venue of any suit maintainable to suspend or

set aside in part or in whole Service Order No. 37, is in the Iowa District Court.

The Interstate Commerce Commission filed an answer, as also did the Minneapolis & St. Louis Railroad Company, by permission of the Court.

The questions of venue and the right to injunction were argued together.

The plaintiff was organized as a railroad under the laws of Illinois some forty years ago, and took over the tracks and terminals of all roads then having tracks and terminals in the city of Peoria, except the Chicago, Rock Island & Pacific Railroad and the Chicago, Burlington & Quincy Railroad, each of which had extensive terminals and has always operated them.

[fol. 148] The roads whose tracks and terminals became the tracks and terminals of the plaintiff became the owners of the capital stock of the plaintiff, and they became known as proprietary lines. Each entered into a contract with the plaintiff, whereby it performed the terminal exchange and transfer service formerly performed by themselves, and also maintained a union station and other conveniences and necessities in the general business.

Contracts substantially similar to those entered into with the proprietary lines were made between the plaintiff and other roads which had no proprietary interest and had no terminal facilities in the city of Peoria, one of those roads being the Minneapolis & St. Louis Railroad Company. That road availed itself of the services of the plaintiff upon the terms and conditions of the contract until April 1, 1921. On the last day of the preceding December, the Minneapolis & St. Louis Railroad Company gave notice to plaintiff that it would no longer pay for the service of effecting transfers between that road and other railroads. That controversy continued until July 15, 1921, when plaintiff gave notice it would no longer handle the cars of the Minneapolis & St. Louis Railroad Company unless it was paid therefor.

In August, 1921, the Minneapolis & St. Louis Railroad Company filed a bill of complaint in this district against plaintiff, seeking to secure a mandatory injunction to perform the services in question. That bill was dismissed for want of jurisdiction.

The matter seems to have been informally brought before the Chairman of the Interstate Commerce Commission, who suggested that if plaintiff desired to make a charge against the Minneapolis & St. Louis Railroad Company it should publish a tariff to that effect, and thereupon plaintiff was authorized to file, on one day's notice, its tariff I. C. C. No. 36, effective August 30, 1921, which tariff seems to be still in effect, (except as affected by the finding below that it was unjust and discriminatory, and that, as appears, it did not cease and desist from that discrimination by July 13, 1922) and fixed a charge of $4 per car between the track connections of the Minneapolis & St. Louis Railroad Company and the plaintiff company.

[fol. 149] On September 22, 1921, the Minneapolis & St. Louis Railroad Company filed its complaint with the Commission, Docket No. 13110, attacking the charge as reasonable and discriminatory.

On April 13, 1922, after a full hearing, the Interstate Commerce Commission found that plaintiff had been rendering services similar to those for which it was seeking to charge the Minneapolis & St. Louis to the Burlington and Rock Island roads without charge, and that the charges under consideration were unjustly discriminatory and unduly prejudicial against the Minneapolis & St. Louis Railroad Company, and added:

"The records are not sufficiently developed to justify an expression of opinion as to what would constitute reasonable charges."

On the same day, the Commission ordered plaintiff to cease and desist on or before July 13, 1922, from practicing the unjust discrimination, and on or before that date to establish charges or practices that would avoid the unjust discrimination.

To correct the evil, plaintiff proposed I. C. C. tariff No. 40, to become effective July 1, 1922, by it proposing a charge for similar service to the Burlington & Rock Island roads.

Upon the protest of those roads, that proposed tariff was suspended before it became effective (I. & S. Docket No. 1596). At the same time that action of the Interstate Commerce Commission seemed to it to make it necessary to re-open investigation under No. 13110 for further hearing in connection with the suspension of I. C. C. tariff No. 40 (I. & S. Docket No. 1596).

Upon hearing, the Commission, on December 22nd, in both cases, held that the proposed charges in Peoria & Pekin Union tariff I. C. C. No. 40 were not justified, and used the following language:

"In short, there is apparently something more necessary to clear up the situation here presented than the mere piecemeal filing of particular tariffs covering services now alleged to be those of a common carrier. We shall not prejudge the question of the status of the respondent, nor the propriety of what rates or charges or divisions or practices should supplant the existing arrangements. In view of the determination made that these schedules have not been justified it will suffice here to indicate that we shall on our own motion institute an investigation, making all parties to this case and all tenants of the Peoria & Pekin Union respondents, to the end that lawful, just, reasonable, and non-prejudicial practices, rates, and charges, and division thereof, shall be established for the services undertaken by them, or any of them in connection with traffic moving to, from, through or within the Peoria-Pekin district.

[fol. 150] "In view of the investigation to be undertaken we shall here make no finding in No. 13110, and shall issue a formal order of dismissal in that case, without prejudice to recanvassing the situation there involved in the course of the investigation aforesaid.

"We find the proposed schedules have not been justified, and an appropriate order will be entered."

On the same day, the Commission entered an order in I. & S. No. 1596 requiring plaintiff to cancel its tariff I. C. C. No. 40 on or before

January 1, 1923, and also entered its order in No. 13110, dismissing the complaint in that proceedings.

The situation at this point was that the plaintiff had failed on or befor- July 13, 1922, to correct the unjust discrimination against the Minneapolis & St. Louis Railroad Company, as ordered by the Interstate Commerce Commission.

It seems that there were some informal conferences between the Minneapolis & St. Louis Railroad Company and the plaintiff before the Interstate Commerce Commission early in January, 1923, which resulted in nothing.

On January 4, 1923, plaintiff, through its president, telegraphed the Interstate Commerce Commission refusal of the Minneapolis & St. Louis to make payments under I. C. C. No. 36 or of any other carrying charges; that plaintiff interpreted the decision of the Commission in No. 1596 as leaving I. C. C. No. 36 in full force and effect, and that it was offering to perform.

On the following day, Commissioner Aitchison wired plaintiff:

"Order against Peoria and Pekin Union Railway still stands unrescinded with finding that its tariff on traffic interchanged with Minneapolis & St. Louis Railway is unduly prejudicial so long as Burlington and Rock Island are preferentially treated. Commission is firmly of opinion that traffic through Peoria gateway must be kept moving in the public interest and desires assurances from you that there will be no interruption pending orderly disposition of any question disputed between your company and common carriers connecting with you."

On January 6, 1923, plaintiff's president replied at length and among other things said:

"I am in hearty sympathy with Commission's opinion that traffic should not be interrupted."

and asked that:

"Present status with Minneapolis and St. Louis which in practical effect has existed for nearly forty years should be continued pending general investigation."

On the same date, the Minneapolis & St. Louis filed a sworn complaint setting out the controversy between it and plaintiff under [fol. 151] Tariff I. C. C. No. 36, and its refusal to pay thereunder for the reasons stated, and that the refusal of the plaintiff to receive traffic prejudiced the rights of the complainant and flagrantly violated the right of the public to have the avenues of commerce kept open and operating. The petition asked "that you exercise the emergency and other powers with which the law has surrounded the commission, and the same are involved, to the end that the respondent (P. & P. U.) may be ordered, directed and compelled to handle the cars of this complainant in interchange at Peoria and moving

under lawfully established rates provided in tariffs on file with the Commission."

On January 8, 1923, an informal conference was held in the office of the Commission with the attorneys for the plaintiff and the Minneapolis & St. Louis, where it was pointed out what the Commission had already done, and that it had ordered and arranged for an investigation with the view of effecting an adjustment of the rate question involved between all of the parties.

Following that conference, the Commission, on January 8th (Commission's Docket No. 14534), following its report of December 22nd, above herein quoted, entered two orders one of which reads in substance as follows:

"It is ordered, That the Commission upon its own motion enter upon an investigation into and concerning the lawfulness of the rates, charges, regulations, and practices of the Peoria & Pekin Union Railway, and railroads with which it connects at and in the vicinity of Peoria, Ill., as applied to traffic to, from and via Peoria, Ill., including the lawfulness of existing contracts between the Peoria & Pekin Union Railway and the so-called tenants of that railroad, also the lawfulness of existing joint rates via Peoria, and the divisions thereof, on traffic moving in connection with the Peoria & Pekin Union Railway, and the nature and extent of the facilities furnished and services rendered by any of the respondents to other of the respondents, at or near Peoria, whether in make-up or break-up yards, spotting, intermediate or terminal service, or otherwise including facilities furnished or services rendered in respect of traffic moving on combination rates which break at Peoria, and the compensation therefor as between the respondents; with a view to determining just and reasonable individual and joint rates, charges, regulations, divisions and practices and requiring establishment thereof by order."

It also entered, on the same date, Service Order No. 37, which is the basis of the complaint of this suit. That order reviewed the fact [fol. 152] that the controversy at Peoria had been brought to the Commission's attention by the formal complaint No. 13110 filed by the Minneapolis & St. Louis Railroad, above referred to. The Order further recited entry by the Commission of the order last above quoted. Also, that the complaint, No. 13110, which had been dismissed, was reopened and consolidated with the general investigation under I. C. C. Docket No. 14534; and, after reciting the matters involved in the controversy and the refusal of the Minneapolis & St. Louis Railroad Company to pay and the threat of the plaintiff to discontinue the service unless payment was made, they found therefrom that "An emergency is thereby created which required immediate action of the Commission," and

"In order best to promote the service in the interest of the public and the commerce of the people, and in order that the constant flow of interstate commerce may not be interfered with, it is ordered and directed, effective forthwith and until the further order of the Commission in the premises, that, etc."

followed by the order complained of, and above quoted. Further, continued, the order provided that copies of the order be served upon the plaintiff and all Peoria railroads and that notice be given to the general public.

It appears that the inquiry by the Commission under Commission's Docket No. 14534, as shown by the order thereunder of January 8, 1923, a part of which is above quoted, was set for February 20, 1923, and that there was included in and made a part of that investigation Docket No. 13110, and Investigation & Suspension Dockets Nos. 1596 and 1455.

In our view of this case, it is necessary to determine both the jurisdictional and the main question in the case. By the provisions of the Act of October 22, 1913 (38 Stats. L. 219) it is provided:

"The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was [fol. 153] made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office."

It is contended by the government that the order in question would not come within any of the exceptions, but that it was entered upon the petition of the Minneapolis & St. Louis Railroad Company filed January 6, 1923, which Company has its residence in the judicial district for the Southern District of Iowa, and that this suit should have been brought there, and that this court has no jurisdiction.

Upon a superficial view of the situation and the reading of Service Order No. 37, it might appear that this contention is well grounded, but a careful reading of the whole record leads us to a different conclusion.

On December 22, 1922, after the controversy at Peoria had ceased to be one relating solely to the original petition of the Minneapolis & St. Louis Railroad and tariff I. C. C. No. 36, and had come to involve as well plaintiff's tariff I. C. C. No. 40 and the Burlington and Rock Island Roads, the Commission found:

"We shall on our own motion institute an investigation, making all parties to this case and all tenants of the Peoria & Pekin Union respondents, to the end that lawful, just, reasonable and non-prejudicial practices, rates, and charges, and divisions thereof, shall be established for the services undertaken by them or any of them in connection with traffic moving to, from through or within the Peoria-Pekin district. In view of the investigation to be undertaken, we shall here make no finding in No. 13110 and shall

issue a formal order of dismissal in that case, without prejudice to recanvassing the situation there involved in the course of the investigation aforesaid."

Following that order, on January 5th, as above shown, the Commission notified plaintiff:

"Commission is firmly of opinion that traffic through Peoria gateway must be kept moving in the public interest and desires assurances from you that there will be no interruption pending orderly disposition of any questions disputed between your company and common carriers connecting with you."

On January 6th, plaintiff's president told the Commission: "I am in hearty sympathy with Commission's opinion that traffic should not be interupted," but failed to give any assurances that it would [fol. 154] not be. So, here seems to have been the well developed firm opinion on the part of the Commission that an emergency existed and that the public interest demanded that the traffic should be kept open, and all of this before the filing of the petition of the Minneapolis & St. Louis Railroad on January 6th, which asked no more. There was no hearing whatever upon the Minneapolis & St. Louis petition of January 6th, and the only petition or complaint of the Minneapolis & St. Louis Railroad Company mentioned in the order is No. 13110, filed September 22nd, 1921, and which had been dismissed prior to the entry of Service Order No. 37, so that we are of opinion that Service Order No. 37 was not entered on the complaint or petition of the Minneapolis & St. Louis Railroad Company. While a complaint such as the Minneapolis & St. Louis Railroad company, made might form the basis or contain the information upon which a service order in the public interest could be entered, yet it is doubtful whether any such order can be said to be entered upon any such petition. Service orders of the character in question are for the benefit of and in the interest of the public, and if it was in any sense favorable to the Minneapolis & St. Louis, except as it was a part of the general public, it would, in our opinion, for that reason, have been an invalid order.

We are of the opinion that the suit was properly brought in this court and is maintainable here as a place where the matter complained of in the several petitions arose, and the prayer for dismissal on that ground is denied.

By the Commerce Act (41 Stats. L. P. 474, Sec. 1, paragraph 15) it is provided that:

"Whenever the Commission is of opinion that shortage of equipment congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: * * *

(b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in [fol. 155] the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable."

The dispute here involved between the Minneapolis & St. Louis Railroad, the P. & P. T., the Burlington and the Rock Island, severally, on the one part, and the plaintiff on the other, involves simply the moving and handling of cars over the tracks of the plaintiff between the carriers doing business through the Peoria gateway and involves the use of the terminals and facilities of the plaintiff, and we are of opinion that the Commission had the right to declare that an emergency existed and to promulgate the order in question.

It is further urged, however, that the order is in violation of the Fifth amendment because it directed the plaintiff to perform a service without any provision that it should get a compensation therefor, and that this was the taking of its property.

We are of opinion that this, under all the circumstances of the case, cannot be said to be true. While in the order itself, the service is enjoined upon plaintiff without any compensation being there provided for, yet the act above quoted, under both "B" and "C" provides that the order may be entered on such terms as may be agreed upon or as the Commission may, after subsequent hearing, find to be just and reasonable. But, in addition to this though we do not deem it necessary to determine the situation of I. C. C. tariff No. 36, which was permitted to be filed and was afterwards found to be unjustly discriminatory against the Minneapolis & St. Louis, yet that tariff was not formally cancelled and it appears that the very purpose of the order was to hold in statu quo conditions at Peoria while the Commission made the investigation set for February 20, 1923, the purpose of which was to determine what compensation if any, the plaintiff should receive not only from the Minneapolis & St. Louis but from the Burlington and the Rock Island, and possibly other questions. It is alleged and not disputed that the identical service commanded by the order has been performed for more than forty years by plaintiff for the Burlington and Rock Island without any compensation being asked, and that that is the identical service which the Minneapolis & St. Louis is asking shall be performed for it without compensation. Of course that could [fol. 156] not be the basis for taking plaintiff's property without compensation, but it does present a very strong argument why the

public should not be inconvenienced and suffer a discontinuance of that service while the Interstate Commerce Commission is investigating the question as to whether such a service should be compensated for, and, if so, what shall be the basis of the compensation.

We are of the opinion that the Interstate Commerce Commission acted within its powers and that the temporary injunction should be, and is denied.

[File endorsement omitted.]

[fol. 157] And afterwards, to wit: on the 19th day of February, A. D. 1923, the following further proceedings were had in said Court in said cause and were entered of record, to wit:

[fol. 158] IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION

[Title omitted]

ORDER DENYING MOTION FOR TEMPORARY INJUNCTION—Filed Feb. 19, 1923

This cause came on to be heard on February 10, A. D. 1923, on motion of Plaintiff for a temporary injunction, and the said motion having been argued by counsel and the court having taken the said motion under consideration until this day and the Court being advised in the premises, it is ordered that the motion be, and the same is hereby denied.

Ordered this 19th day of February, A. D. 1923.

To be filed as of Feby. 19, 1923.

Geo. T. Page, United States Circuit Judge. Louis Fitz Henry, United States District Judge. George W. English, United States District Judge.

[File endorsement omitted.]

[fol. 159] And afterwards, to wit: on the 6th day of March, A. D. 1923, there was filed in the office of the Clerk of the District Court of the United States for the Northern Division of the Southern District of Illinois, a certain petition for appeal which said petition was and is in the words and figures, following, to wit:

[fol. 160] IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION

[Title omitted]

PETITION FOR APPEAL—Filed Mar. 6, 1923

To the Honorable District Court of the Southern District of Illinois:

Peoria & Pekin Union Railway Company, the above named Plaintiff, feeling aggrieved by the order made and entered in the above entitled cause on the 19th day of February, A. D. 1923, denying the application of the Plaintiff for a temporary injunction restraining the Interstate Commerce Commission and the United States of America from enforcing the terms of a certain Service Order No. 37, of the Interstate Commerce Commission and adjudging the said service order to be in all respects null and void and ordering the same to be abrogated, cancelled and set aside and enjoining the Interstate Commerce Commission and the United States of America from taking any steps to enforce the said order or from bringing any suits against the Plaintiff for penalties, does hereby appeal from that part of said order herein mentioned to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and it prays that its bill be allowed and that citations be issued as provided by law and that a transcript of the record and proceedings and documents upon which said order was based, duly authenticated, be sent to the Supreme Court of the United States sitting at Washington in the District of Columbia, under the rules of such court in such cases made and provided.

Dated this 1st day of March, A. D. 1923.

Peoria & Pekin Union Railway Company, By V. V. Boatner, President. R. V. Fletcher, Frank J. Quinn, Horton & McLaughlin, Attorneys.

[File endorsement omitted.]

[fol. 161] And afterwards, to wit: on the 6th day of March, A. D. 1923, there was filed in the office of the clerk of the District Court of the United States for the Northern Division of the Southern District of Illinois, a certain Assignment of Errors, which said Assignment of Errors was and is in the words and figures, following, to wit:

[fol. 162] IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Mar. 6, 1923

Now comes the above named plaintiff, Peoria & Pekin Union Railway Company, by its Attorneys, and presents with the accompanying Petition for Appeal from the Order entered herein on the 19th day of February, A. D. 1923, the following assignment of errors:

First. The Court erred in denying the application of the Plaintiff for a temporary injunction restraining the Interstate Commerce Commission and the United States of America from enforcing the terms of a certain Service Order No. 37, of the Interstate Commerce Commission, and in failing to adjudge the said Service Order to be in all respects null and void and ordering the same to be abrogated, cancelled and set aside, and in failing to enjoin the Interstate Commerce Commission and the United States of America from taking any steps to enforce the said Order or from bringing any suits against the said Plaintiff for penalties.

Second. The Court erred in permitting the Minneapolis & St. Louis Railroad Company to intervene and file its answer.

Third. The Court erred in holding that Paragraph 15 of Section 1 of the Interstate Commerce Act gave to the Interstate Commerce Commission jurisdiction and authority to enter Service Order No. 37.

Fourth. The Court erred in holding that the Order of the Interstate Commerce Commission was an order with reference to cars, locomotives and other vehicles of transportation.

[fol. 163] Fifth, the Court erred in holding that the service required of the Peoria & Pekin Union Railway Company was in reality a requirement that the terminals of the Peoria and Pekin Union Railway Company should be used by the Minneapolis & St. Louis Railway Company.

Sixth, the Court erred in holding that the Order of the Interstate Commerce Commission was not a violation of the Fifth Amendment to the Constitution of the United States and that it was not a taking of private property for public use without compensation.

Respectfully submitted, this 1st day of March A. D. 1923.
Peoria & Pekin Union Railway Company, By V. V. Boatner, President. B. V. Fletcher, Frank J. Quinn, Horton & McLaughlin.

[File endorsement omitted.]

[fol. 164] And afterwards, to wit: on the 6th day of March, A. D. 1923, the following further proceedings were had in said Court in said cause and were entered of record, to wit:

[fol. 165] IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION

[Title omitted]

ORDER ALLOWING APPEAL—Filed Mar. 6, 1923

The above named plaintiff, Peoria & Pekin Union Railway Company, having duly filed its petition for Appeal and an Assignment of Errors, it is ordered by the Court that an appeal to the Supreme Court of the United States from the order heretofore filed and entered herein be, and the same is hereby allowed, and that a certified transcript of the record, affidavits, documents and all proceedings herein be forthwith transmitted to said Supreme Court.

It is further ordered that the bond on appeal be, and the same is hereby fixed at the sum of $250.00 same to act as a bond for costs and damages on appeal, said bond to be filed and approved within ten days from the date hereof.

Dated this 2nd day of March A. D. 1923.

Geo. T. Page, United States Circuit Judge. Louis Fitz Henry, United States District Judge. George W. English, United States District Judge.

[File endorsement omitted.]

[fol. 166] And afterwards, to wit: on the 7th day of March, A. D. 1923, there was filed in the office of the Clerk of the District Court of the United States for the Northern Division of the Southern District of Illinois, a certain bond on appeal, which said bond was and is in the words and figures, following, to wit:

[fol. 167] IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION

[Title omitted]

BOND ON APPEAL [For $250.00; filed and approved Mar. 7, 1923; omitted in printing]

[fol. 168] [File endorsement omitted.]

[fol. 169] And afterwards, to wit: on the 16th day of March, A. D. 1923, there was filed in the office of the Clerk of the District Court of the United States for the Northern Division of the South-

ern District of Illinois, a certain præcipe for record, which said præcipe for record with acknowledgement of service of copies thereof, was and is in the words and figures, following, to wit:

[fol. 170] IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION

[Title omitted]

PRÆCIPE FOR RECORD—Filed Mar. 16, 1923

To the clerk of the above-entitled court:

You will please prepare Transcript of the Record in this cause to be filed in the Office of the Clerk of the Supreme Court of the United States, under the appeal heretofore allowed by the District Court of the United States for the Southern District of Illinois, Northern Division, from the Order of February 19, 1923, and include in the said Transcript the following pleadings, proceedings and papers on file:

1. Bill of the Peoria & Pekin Union Railway Company.

2. Answers of the United States of America, Interstate Commerce Commission, Minneapolis & St. Louis Railroad Company.

3. Motions and Orders prior to February 19, 1923.

4. Opinion of Judges Page, Fitz Henry and English filed herein on February 19, 1923, and Order of the same date.

5. Petition for Appeal of the Peoria & Pekin Union Railway Company, together with its Assignment of Errors.

6. Order granting appeal.

7. Bond of Peoria & Pekin Union Railway Company, and

8. Citation.

R. V. Fletcher, F. J. Quinn, Horton & McLaughlin, Attorneys for Plaintiff.

Service of a copy of the foregoing Præcipe is hereby admitted this 8th day of March, A. D. 1923.

Blackburn Esterline, Assistant to the Solicitor General for the United States of America; P. J. Farrell, Attorneys for Interstate Commerce Commission. Mar. 12, 1923. M. M. Joyce & Donald Evans, Attorneys for Minneapolis & St. Louis Railroad Company.

Acknowledged for U. S. March 12, 1923.

[File endorsement omitted.]

[fol. 171] And afterwards, to wit: on the 22nd day of March, A. D. 1923, there was filed in the office of the Clerk of the District Court of the United States for the Northern Division of the Southern District of Illinois, a certain præcipe of defendants for record, which said præcipe was and is in the words and figures, following, to wit:

[fol. 172] IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION

[Title omitted]

PRÆCIPE OF DEFENDANTS FOR RECORD—Filed Mar. 22, 1923

To the Clerk:

In preparing transcript of record to be filed in the office of the Clerk of the Supreme Court of the United States, under the appeal heretofore allowed by the District Court, please include therein, in the order given below, and immediately following the answer of the United States, the following papers, to wit:

1. Certified copy of petition of Minneapolis & St. Louis Railroad, filed before the Interstate Commerce Commission, requesting Commission to exercise the emergency and other powers authorized by the Transportation Act.

2. Certified copy of articles of incorporation of Minneapolis & St. Louis Railroad Company and amendments and supplements thereto.

And immediately following the answer of the Interstate Commerce Commission, the following papers, to wit:

1. Two telegrams, V. V. Boatner to Commissioner Aitchison, dated January 6 and 16, 1923, respectively.

Blackburn Esterline, Assistant to the Solicitor General. R. Granville Curry, E. M. Reidy, Solicitors for Interstate Commerce Commission.

[File endorsement omitted.]

[fol. 173] And afterwards, to wit: on the 31st day of March, A. D. 1923, the following further proceedings were had in said Court in said cause and were entered of record, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION

Saturday, March 31st, 1923.

Court met pursuant to adjournment,
Present: the Honorable Louis Fitz Henry, Judge.

[Title omitted]

ORDER EXTENDING TIME

And now on this 31st day of March, A. D. 1923, comes the complainant herein by Messrs Horton & McLaughlin, its solicitors and on their motion, it is ordered by the court that the time for filing the transcript of record and for docketing said case in the United States Supreme Court, be, and the same is hereby extended for a period of thirty days from and after this date, to and including April 30th, 1923.

[fol. 174] CITATION AND SERVICE—Filed Mar. 16, 1923

UNITED STATES OF AMERICA, ss:

The President of the United States to the United States of America, the Interstate Commerce Commission, and the Minneapolis & St. Louis Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C. within thirty days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of Illinois, Northern Division, wherein the Peoria & Pekin Union Railway Company is appellant, and you are appellees, to show cause, if any there be, why the order entered against the said appellant as in the said appeal, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George T. Page, United States Circuit Judge, The Honorable Louis Fitz Henry, United States District Judge, and The Honorable George W. English, United States District Judge, this 2nd day of March in the year of our Lord, one thousand nine hundred and 23.

Geo. T. Page, United States Circuit Judge. Louis Fitz Henry, United States District Judge. George W. English, United States District Judge.

Service of the within citation is accepted this 12th day of March, A. D. 1923.

Blackburn Esterline, Assistant to the Solicitor General, for the United States of America; P. J. Farrell, Attorneys for the Interstate Commerce Commission. M. M. Joyce, Donald Evans, Attorneys for the Minneapolis & St. Louis Railroad Company.

[File endorsement omitted.]

[fol. 175] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Southern District of Illinois,
Northern Division, ss:

I, S. T. Burnett, Clerk of the District Court of the United States for the Southern District of Illinois and keeper of the records and Seal thereof, do hereby certify the foregoing to be a true and complete transcript of the proceedings had of record and on file in said court in the cause entitled Peoria & Pekin Union Railway Company, a Corporation, Plaintiff vs. The United States of America, Defendant, No. 205, In Equity, (made in accordance with præcipes for record filed herein) as fully as the same appear from the records and files of said Court now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, at Peoria, in said District, this 18th day of April, A. D. 1923.

S. T. Burnett, Clerk. [Seal of the District Court United States, Southern District of Illinois, Northern Division.]

[Endorsed:] No. 205. District Court United States, Southern District of Illinois, Northern Division. Peoria & Pekin Union Railway Company, a corp., vs. The United States of America. Transcript of Record.

Endorsed on cover: File No. 29,594. S. Illinois D. C. U. S. Term No. 318. Peoria & Pekin Union Railway Company, appellant, vs. The United States of America, Interstate Commerce Commission, and Minneapolis and St. Louis Railroad Company. Filed May 2d, 1923. File No. 29,594.

FILED
OCT 31 1923
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

No. 318

PEORIA AND PEKIN UNION RAILWAY COMPANY, *Appellant*,

vs.

THE UNITED STATES OF AMERICA, ET AL, *Appellees*

BRIEF FOR APPELLANT

JOHN M. ELLIOTT,
ROBERT V. FLETCHER,
Attorneys for Appellant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

No. 318

PEORIA AND PEKIN UNION RAILWAY COMPANY, *Appellant*,

vs.

THE UNITED STATES OF AMERICA, ET AL, *Appellees*

I. STATEMENT OF THE CASE.

This case comes to this Court on the appeal of the Peoria and Pekin Union Railway Co. from a decree of the United States District Court for the Southern District of Illinois denying appellant's motion for a temporary injunction. The Bill filed by appellant challenged the validity of a certain emergency service order made by the Interstate Commerce Commission, known in this record as Service Order No. 37, by the terms of which appellant, Peoria and Pekin Union Railway Co., was required to switch cars in interchange between the Minneapolis and St. Louis Railroad

Co. (hereinafter for brevity designated as the M. & St. L.), and connecting carriers at and in the vicinity of Peoria, Ill. The suit was brought by the Peoria and Pekin Union Railway Co. against the United States of America under the provisions of the Urgent Deficiency Appropriations Act of October 22, 1913, 38 Stat. L., 219.

The Bill alleges in substance that the Peoria and Pekin Railway Co., is a railroad corporation organized and existing under the General Railroad Act of the State of Illinois, and that by the terms of its charter it has the right to operate, and does operate a railroad extending from Peoria, Peoria County, Ill., to Pekin, Tazewell County, Ill. The Bill shows that while appellant is engaged in a general railroad business, its principal work is in connection with switching and terminal service. It is shown that the Peoria and Pekin Union Railway at various times entered into contracts with some eight railroads operating in the vicinity of Peoria, by the terms of which contracts, all being of the same general tenor, the Peoria and Pekin Union Railway agreed to perform the necessary switching, whereby freight traffic and freight cars might be interchanged among the several railroads. One of these contracts, which is typical of all the others, was made an exhibit to the Bill, (R. 15). One of the railroads thus entering into contract with the appellant was the Iowa Central, the predecessor in title and interest of the M. & St. L. By the terms of this contract, the M. & St. L. agreed to pay to the Peoria and Pekin Railway Co., appellant here, a certain sum per car for the service performed by appellant in transferring freight traffic and freight cars to and from the M. & St. L. from and to connecting railroads in the vicinity of

Peoria. All the railroads operating in the Peoria territory formerly had contracts of this tenor with appellant, except the Chicago, Burlington and Quincy Railroad Co., and the Chicago, Rock Island and Pacific Railroad Co. By reason of these contracts, prior to April 1, 1921, all the railroads operating into Peoria (except the Rock Island and Burlington, as stated) each bore one-half of the cost of transferring freight from each railroad to every other. With certain unimportant exceptions, none of the railroads serving the Peoria territory had direct physical connection one with the other, and as a result, it was necessary for these railroads to engage the services of the Peoria and Pekin Union Railway Co., whereby the transfer of freight could be made from one trunk line to another.

The Bill avers that for about 35 years prior to April 1, 1921, the M. & St. L. and its predecessor in title, by virtue of the contract entered into between that Company and appellant, employed appellant to make transfer of freight and freight cars to connecting lines just as did all other railroads operating in and about Peoria, (except as stated the Chicago, Burlington and Quincy, and the Chicago, Rock Island and Pacific). By reason of this contract and the employment of appellant in the capacity stated, the M. & St. L. had fairly borne its due proportion of the expense of making transfers of freight and freight cars, it being an established railroad practice that such expense should be borne in equal portions by the railroads participating in the transfer. During all this time the M. & St. L. recognized its obligation to pay its fair proportion of this transfer expense, since the rails of the M. & St. L. did not connect directly with the rails of other lines. It is stated in the Bill that the expense of mak-

ing transfers of this character is under established railroad practice borne by the interchanging lines in one of two ways. In some cases each of the interchanging lines bears one-half of the expense of the transfer in both directions, and in other cases the delivering line bears the entire expense of transferring the cars to its connection. Assuming that the interchange of traffic is evenly balanced in both directions, these two methods impose substantially the same expense upon each of the interchanging lines.

The Bill recites that the line of the M. & St. L. touches the City of Peoria only in the extreme southwestern corner thereof, its rails terminating at a point known as Iowa Junction, near which it maintains a yard known as the Bartlett Yard. The end of its rails is separated from the rails of connecting lines (other than the Rock Island) by distances that vary from one-half mile in the case of the Chicago and Northwestern Railway, to some 12 miles, in the case of the Illinois Central, Cleveland, Cincinnati, Chicago and St. Louis, and Chicago, Peoria and St. Louis, the rails of all of which end at Pekin, Ill. Under the terms of the several contracts, all of which were similar, each railroad was granted the right and privilege of moving its freight trains over the tracks of the appellant from the point of contact between the rails of the trunk lines and the rails of appellant to a convenient intermediate point of interchange designated by appellant, which point of interchange at the time this controversy arose, and for some years theretofore, was a yard owned and maintained by appellant known as the East Peoria Yard.

The work of breaking up the incoming trains at this East Peoria Yard and making up outgoing trains for the various tenant companies, thereby effecting a

transfer from one railroad to the other, was done under the terms of the contract by appellant. For the use of these tracks, and for the service of appellant in effecting this transfer, each of the railroad companies paid a certain charge to appellant, this charge varying from time to time, in accordance with fluctuations in the cost of performing the service. As an illustration, assuming that a freight train came into Peoria over the rails of the M. & St. L., composed of cars which were to be transferred to various other railroads for outbound movement from Peoria, the Minneapolis and St. Louis would with its own engine haul this train over the tracks of the Peoria and Pekin Union Railway from Bartlett Yard, a distance of about three miles, to the East Peoria Yard. There the engine of the M. & St. L. would be detached from the train, and a switch engine of the Peoria and Pekin Union would take charge of the train, switch the cars upon convenient tracks, where these cars would be put into outbound trains of other railroad companies for outbound transportation from Peoria. When each train was made up for such outbound carriers, the engines of these outbound carriers would be attached to the trains and the trains would move out from the East Peoria Yard over the rails of the Peoria and Pekin Union to the point where such rails connected with the rails of the outbound carrier. By virtue of this arrangement, each railroad paid its proper portion of the expense of making the transfer.

On or about December 31, 1920, the M. & St. L. served notice upon the appellant, Peoria and Pekin Union Railway Co., that effective April 1, 1921, the M. & St. L. would no longer be bound by the terms of the contract theretofore existing. By the terms of the con-

tract, any company had the right to terminate the same upon notice, and no question is made as to the right of the M. & St. L. thus to terminate its contract relations with the appellant. The controversy between appellant and the M. & St. L. arises from the fact that after April 1, 1921, the M. & St. L. refused to pay anything to appellant for the service performed by appellant in transferring the cars between the M. & St. L. and other railroad companies at Peoria.

Beginning April 1, 1921, when the M. & St. L. had a car for one of its connections at Peoria, it placed this car upon an interchange track near Iowa Junction, thereby delivering the car to appellant. The M. & St. L. insisted that the delivery of a car to appellant was a delivery to each of appellant's tenants, and that its obligation was discharged when it had placed this car upon an interchange track near the point of contact between the rails of the M. & St. L. and the rails of appellant. Upon the same theory, it insisted that appellant was under obligations to deliver to the Minneapolis and St. Louis on the track of the M. & St. L. all of the cars coming from connections moving outbound from Peoria over the rails of the M. & St. L. In other words, the M. & St. L. took the position that the rails of the Peoria and Pekin Union were simply an extension of the rails of the tenant lines, and that the Peoria and Pekin Union was the mere agent of all the tenant lines. For this reason, the M. & St. L. declined to bear any part of the expense of making the transfer.

Following the announced determination of the M. & St. L. not to pay any part of the transfer expense, appellant served notice upon that line that appellant would thereafter decline to perform this transfer service unless some arrangement was made by contract or

otherwise, whereby the M. & St. L. would bear its proper proportion of the transfer expense. Following this notice, the M. & St. L. filed its Bill in the United States District Court for the Southern District of Illinois, against the appellant, and a number of its tenant lines, wherein an injunction was sought mandatory in character, requiring appellant to continue to perform the transfer service without compensation to be paid by the M. & St. L. Appellant moved to dissolve this injunction, and upon hearing, the Court entered an order in the following words:

> "Ordered and adjudged that the motion of the Complainant for a temporary injunction be and the same is denied, and the said Bill be and the same is hereby dismissed for want of jurisdiction and equity, to all of which Plaintiff by counsel excepts." (R. 7.)

In the meantime, after the filing of this Bill by the M. & St. L., and before the hearing was had, appellant after a conference with the then Chairman of the Interstate Commerce Commission, filed a Tariff, known as No. 36, under the terms of which it was provided that a charge of $4 per car should be imposed for each car handled for the M. & St. L. in interchange service between Iowa Junction, where the rails of the M. & St. L. connect with the rails of appellant, and the East Peoria Yard, the established point of interchange used by appellant in making transfer of cars to and from all lines of railroad for which appellant performs a transfor service in the Peoria territory. This tariff was made effective on one day's notice, under special permission granted by the Interstate Commerce Commission, the effective date of the tariff being August 30,

1921. From and after the effective date of this tariff, and from and after the rendition of the decree in the said cause brought by the M. & St. L. against appellant and other railroads, the M. & St. L. paid to appellant until January 8, 1923, the sum of $4 per car for effecting the transfer between the M. & St. L. and its connections at Peoria.

Shortly after the Bill of the M. & St. L. was dismissed by the United States District Court for the Southern District of Illinois, and shortly after the taking effect of the Tariff No. 36, the M. & St. L. filed a complaint before the Interstate Commerce Commission against appellant under the Docket No. 13110, by which complaint, the M. & St. L. sought to have this Tariff No. 36 cancelled and set aside as being illegal, unreasonable and discriminatory. Answer was filed on behalf of the appellant, testimony was taken, and the case was in due course submitted to the Interstate Commerce Commission. On April 13, 1922, the said Commission rendered its report and order in this case, (*68 I. C. C. 412*) (R. 33), in which the Commission decided that appellant had the right to file a tariff imposing a charge to be paid by the M. & St. L. for this transfer service. However, the Commission concluded, and so stated in its report, that the charge could not be made against the M. & St. L. unless a similar charge was made against the Chicago, Rock Island and Pacific, and Chicago, Burlington and Quincy, roads which the Commission found to be in the same situation as the M. &. St. L. The Commission expressed itself as not entirely satisfied with the measure of the charge, and entered its order requiring the charge to be cancelled, but permitting the appellant to remove the declared discrimination by filing similar charges against other

railroads at Peoria, particularly the Rock Island and the Burlington. The Bill alleges that after the rendition of this report and order, appellant filed another tariff, being Tariff No. 40, imposing charges upon the Chicago, Rock Island and Pacific, the Chicago, Burlington & Quincy, and the Peoria Railway Terminal (the latter Company being a small switching line in Peoria), by means of which tariff, appellant proposed to remove the discrimination which had been found by the Commission. Upon the protest of the railroads affected by Tariff No. 40, the Interstate Commerce Commission suspended this tariff and at the same time, upon the petition of the M. & St. L., reopened cause No. 13110. In accordance with the action of the Commission in suspending this tariff, another hearing was had before the Commission, at which testimony was offered, and thereafter the consolidated cases were re-argued and submitted to the Commission. On December 22, 1922, the Interstate Commerce Commission rendered an opinion and order in this consolidated case (*77 I. C. C. Rep. 43*) (R. 40), by the terms of which, Tariff No. 40 was required to be cancelled as being discriminatory, and the Commission announced that the situation was such that it would be necessary for it to order a general investigation into the situation, to which all parties to that case, and also all tenants of the appellant should be made parties, wherein the Commission would determine for itself what should be the reasonable and non-prejudicial rates and charges to be paid by all the interested parties at Peoria. However, the Tariff No. 36, imposing a charge upon the M. & St. L. was not in any way affected by this order, and this tariff remained in full force and effect.

The order of the Commission (R. 48) dismissed fin-

ally the complaint of the M. & St. L., No. 13110, leaving as stated, Tariff No. 36 in full force and effect. The Bill shows further that sometime after the rendition of this second opinion of the Commission, to wit, on or about January 2, 1923, the M. & St. L. served notice upon appellant that it would no longer continue to pay the tariff charge of $4 per car for making the transfer of cars to and from the M. & St. L. from and to its connections at Peoria, nor would it pay any other sum for such service, and that from and after the date of the notice it would expect the appellant to perform this service without charge to the M. & St. L. When this notice was received by the appellant, it notified the M. & St. L. that in view of the existence of the tariff, as well as the obvious duty of the M. & St. L. to pay its part of the transfer charge, appellant would not perform the transfer service without compensation, and that from and after the date named by appellant, appellant would refuse to receive any cars from the M. & St. L., or deliver any cars to the M. & St. L., unless the tariff charge was paid to appellant in advance of the performance of the service. The Bill shows that the attention of the Interstate Commerce Commission was drawn to this controversy, and that the appellant's President received, on January 5, 1923, a telegram from one of the members of the Interstate Commerce Commission asking plaintiff not to take any action which would result in the interruption of traffic. As a result of this telegram, appellant continued for a time to perform the service for the M. & St. L., until conferences were had between members of the Interstate Commerce Commission on the one hand and representatives of appellant, on the other. These conferences were ineffectual to bring about any agree-

ment or understanding between appellant and the M. & St. L., so that appellant served a final notice upon the M. & St. L. to the effect that from and after 12 o'clock noon on January 20, 1923, appellant would refuse to handle any traffic in interchange for the M. & St. L., unless its transfer charges were paid therefor.

The Bill shows that after the receipt of this notice, and before its effective date, namely on January 18, 1923, one of the divisions of the Interstate Commerce Commission, to wit, Division 5, made and entered its certain service order 37, to cancel and set aside which order this proceeding was instituted. This service order is Exhibit 1 to the Bill, and is found on pages 13 and 14 of the Record. Following certain recitals therein contained, the order provides (R. 14):

> "That the Peoria & Pekin Union Railway Co. shall with reasonable promptness and diligence continue to interchange freight traffic between the Minneapolis & St. Louis Railroad Company and connecting carriers at the regularly established interchange points at and in the vicinity of Peoria, Ill."

Thereupon appellant filed this Bill setting out the facts above briefly stated, and alleging that the service order was null and void for the reason that neither the Interstate Commerce Commission nor any division thereof had authority under the law to make an order of this kind. It is alleged in the Bill that the order is a so-called emergency order issued by the Interstate Commerce Commission under pretended authority granted by the Interstate Commerce Act, but that it is in excess of the power of the Interstate Commerce Commission, and is consequently of

no validity. It is charged, also, that the order of the Interstate Commerce Commission requiring appellant to perform this service without compensation, amounts to a taking of property of appellant without due process of law, and also a taking of private property for public use without just compensation, contrary to the Fifth Amendment to the Constitution of the United States. Upon the filing of this Bill in the United States District Court, the judge of the Court called in two other judges, one of whom was a circuit judge, as the Statute requires. Interventions were made by the Interstate Commerce Commission (R. 73), and by the M. & St. L., as being a party in interest. The United States filed its answer (R. 50) setting up the fact that service order No. 37, which the Bill seeks to cancel, was made upon the petition of the M. & St. L., and that the M. & St. L. had its residence in the Southern District of Iowa. The United States, therefore, challenged the jurisdiction of the District Court for the Southern District of Illinois, contending that under the venue provision of the Urgent Deficiency Appropriations Act (38 Stat. L. 219), the suit could be brought only in the Southern District of Iowa. As exhibits to this answer, the United States attached copy of a Complaint and Application, so called (R. 52) filed with the Interstate Commerce Commission by the M. & St. L., and also exhibits showing that the M. & St. L. is a corporation having its legal residence in the Southern District of Iowa. The Interstate Commerce Commission filed its answer (R. 74 et seq.) replying specifically to each of the paragraphs of the Bill, making certain admissions and certain denials not necessary to set out at large. The M. & St. L. having intervened, filed an answer (R. 83,

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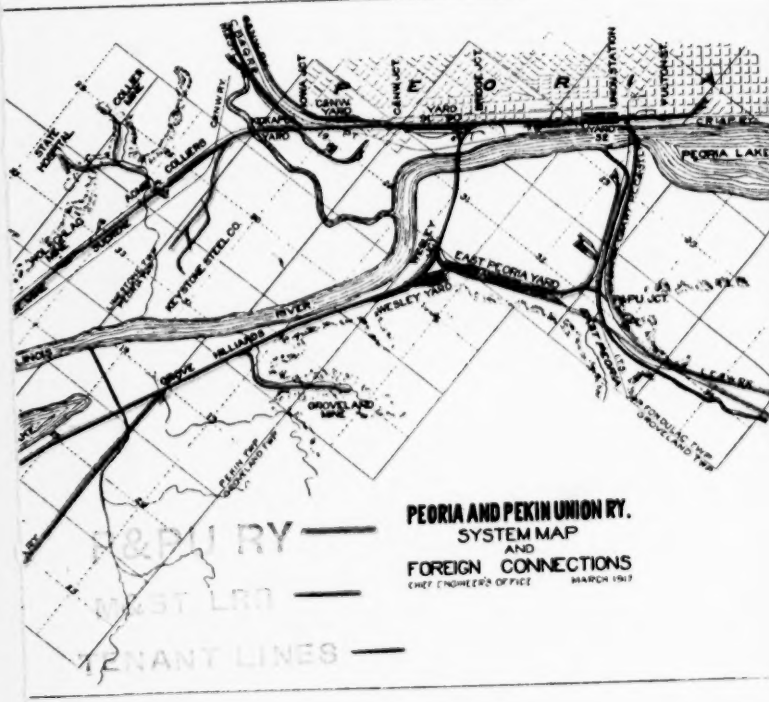

graphs of the Bill, making certain admissions and certain denials not necessary to set out at large. The M. & St. L. having intervened, filed an answer (R. 83,

et seq.), in which it was insisted among other things that the service order of the Commission under consideration, was in effect an adjudication by the Commission, that the appellant was merely the agent of

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et seq.), in which it was insisted among other things that the service order of the Commission under consideration, was in effect an adjudication by the Commission, that the appellant was merely the agent of its tenant lines at Peoria, and was therefore, not entitled to make any charge for the transfer service rendered by it. The cause having been submitted to the Court upon appellant's motion for a temporary injunction, the Court denied this motion. The opinion of the Court appears in the record at page 94, et seq. The Court, however, overruled the contention made by the Government that it was without jurisdiction, by reason of the venue provision referred to, but held that the order of the Interstate Commerce Commission was within the power of that body, and that the motion for injunction should be denied upon the merits. From this decision, the present appeal is prosecuted. A map or plat, showing the lay-out in the vicinity of Peoria appears opposite this page. On this map the facilities of the M. & St. L. are indicated by one color, the facilities of appellant by another, and the facilities of tenant lines by a third. The point of interchange adopted by appellant, namely, the East Peoria Yard, is conspicuously shown. The service for which appellant demanded compensation consists in taking cars from the facilities of the M. & St. L., and transporting these cars, whether loaded or empty, to the East Peoria Yard, a distance of approximately three miles, where delivery is made to other lines operating in the Peoria territory. This service is covered by a $4 charge under the terms of Tariff 36, which was in effect at the time service order 37 was issued by the Commission.

II. ARGUMENT.

A. The Venue Question.

As shown in the preceding statement of the case, it was contended by the appellees that the United States District Court for the Southern District of Illinois was without jurisdiction to try the issue submitted, it being contended that the only court where the issue could be tried is the United States District Court for the Southern District of Iowa, where the M. & St. L. R. R. Co. has its legal residence (R. 51). It was insisted that the service order which the Bill attacks is an order of the Interstate Commerce Commission made upon the petition of the M. & St. L. The contrary contention urged by appellant and adopted by the Court below is that the order of the Commission was not made upon the petition of the M. & St. L., within the meaning of the Statute, but that it is an order made by the Commission upon its own motion in a proceeding instituted by the Commission, and that the venue therefore properly exists in the district where the matter complained of arises, or, in the district where the petitioner in court has its principal office. In view of the fact that the matter complained of arises in Peoria, and the further fact that appellant has its principal office in Peoria, the contention of appellant is that the southern district of Illinois, in which Peoria is situated, is the proper district in which to bring a suit of this kind.

1. Effect of Failure to Appeal.

No one of the defendants, the United States, the Interstate Commerce Commission, nor the M. & St. L., has prosecuted an appeal in this case, or has assigned

errors attacking the decision of the Court upon this venue question. Since the District Court held that it had jurisdiction, and that the suit was properly brought in that Court, and since none of the defendants has prosecuted an appeal or assigned errors, it would seem that appellees are precluded from urging in this Court any error of the lower court with respect to this question of venue.

The rule on the subject is thus laid down by Mr. Justice Holmes:

> "According to the rule that has been laid down in this Court, Gabriella, as she did not appeal, cannot go beyond supporting the decree and opposing every assignment of error. Mt. Pleasant vs. Beckwith, 100 U. S. 514, 527; The Stephen Morgan, 94 U. S. 599; Chittenden vs. Brewster, 2 Wall. 191, 196; Field vs. Barber Asphalt Paving Co., 194 U. S. 618, 621.
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> *Landram vs. Jordan*, 203 U. S., 56, 62.

In *Field vs. Barber Asphalt Paving Co., supra,* it was said by Mr. Justice Day at page 621 of the opinion:

> "If therefore, the whole case can come to this Court by direct appeal under the allegations of this Bill, and if all the questions, Federal or otherwise, may come up on such appeal, it must follow that either party aggrieved by the decision may appeal, and in this case the complainant appealing, cross appeal may be sued out by the defendant as to the matters decided in the same case against him. If he fails to take such appeal, the correctness of the decision as against him will be presumed. Mail Co. vs. Flanders, 12 Wall. 130; Chittenden vs. Brewster, 2 Wall. 191, 196."

A case which seems to be directly in point is:

Southern Pine Co. vs. Ward, 208 U. S., 126.

In that case Ward prevailed in his suit in a court of first instance in the territory of Oklahoma. His defeated adversary appealed to the Supreme Court of the territory. In that Court, Ward moved to dismiss his adversary's appeal for certain reasons. The territorial Supreme Court overruled Ward's motion to dismiss, but affirmed the case in his favor on the merits. Ward did not prosecute an appeal to the Supreme Court of the United States, but urged in this Court, among other things, that the territorial Supreme Court should have dismissed his adversary's appeal. This court, speaking through Mr. Justice White, said, page 137 of the opinion:

> "The remaining grounds, viz., the failure of the Court below to dismiss and the inadequacy of the assignments of error involve no question concerning our jurisdiction. In order, however, to at once dispose of the first contention, we observe that the appellees cannot be heard to assail the judgment below, since they did not appeal. Field vs. Barber Asphalt Paving Co., 194 U. S. 618, 621, and cases cited."

This authority seems to be precisely in point. Ward challenged the jurisdiction of the territorial Supreme Court, and losing upon this issue, did not appeal from this phase of the decision. By this Court's decision, he was not permitted to urge this action of the lower court as ground of error. In the instant case, appellees urged the lack of jurisdiction in the District Court, and losing upon this point, did not appeal. According to the authorities cited, the question cannot be argued by appellees in this Court.

2. Merits of the Venue Contention.

If mistaken, however, in this contention, and if the Court should conclude that its jurisdiction depends upon the jurisdiction of the District Court, and this question of jurisdiction is always open, we think it is manifest that the court below correctly decided the jurisdictional point. The Statute on the subject reads as follows:

> "The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission, shall be in the judicial district wherein is the residence of the party, or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation, or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office." (38 Stat. L. 219.)

It must be admitted that the statute is not a model of clearness. However, apparently three classes of cases are provided for. In the first place, provision is made for attacking orders of the Commission made upon the petition of a party. Suits of this character must be brought in the district wherein is the residence of the party upon whose petition the order is made. The second clause relates to orders not made upon the petition of any party, but relating to a matter in which

the Commission has received a petition of some sort. Cases to attack an order of this kind must be in the district where the matter complained of arises. The third class relates to cases where the Commission has received no petition of any kind, and in this class the case in court must be brought where the plaintiff in court has its principal office. In the case at bar, it is shown that during the progress of the controversy, the M. & St. L. filed an *ex parte* petition of some sort with the Commission, asking for some relief not very clearly defined. This petition appears at page 52 of the Record. It was filed January 6, 1923. When we examine service order 37 (R. 13), it will be seen, as stated by the court below (R. 100), that the controversy to which the order relates had been in progress for some time before this *ex parte petition* was filed, and that numerous orders had been entered by the Commission with respect to the situation prior to the filing of this petition or complaint. It is recited in the service order (R. 13) "the subject of routing freight traffic being under consideration." The order therefore related to the subject of routing freight traffic. It is said in the first paragraph of the order that the controversy was first called to the attention of the Commission by the complaint filed by the M. & St. L. in Docket 13110, which was a formal complaint. It is shown in the second paragraph of the service order that on January 8, 1923, the Commission by its order 14534 had entered upon a general investigation into and concerning the lawfulness of rates, regulations, and practices of the Peoria and Pekin Union Railway Co., and other railroads. It is recited that the petition of the M. & St. L. (this being the petition appearing on page 52 of the Record), brought to the

attention of the Commission the fact that appellant had indicated its purpose of refusing to interchange traffic. It is recited (R. 14) that appellant had given to the Commission and to the M. & St. L. notice that it would discontinue interchanging traffic, unless arrangement was made for payment. There is a further recital that the order is necessary to promote the service in the interest of the public and the commerce of the people, and in order that the flow of commerce may not be interfered with. In view of these recitals, and the history of the matter, as shown in the Record and condensed in the preceding statement of facts, it is clear that while the M. & St. L. filed some sort of complaint or petition with the Commission, yet the order was not entered upon the petition of the M. & St. L. in the sense in which that expression is used in the first clause of the venue statute, which we have quoted above. Looking at the statute in its entirety, it would seem that this first clause relates to orders of the Commission made as a result of a formal complaint under Section 13 of the Interstate Commerce Act. That Section provides for the filing of complaints, for service of notice upon the carrier against which the complaint is lodged, for answer by the carrier and for a hearing in a formal way before the Commission. In the instant case, as the Bill alleges, and as the Record shows, appellant had no notice whatever of the filing of this alleged complaint, no hearing was had upon the complaint, appellant was given no opportunity to make representations to the Commission with respect to the allegations of the petition, and the order was evidently made by the Commission in the exercise of its emergency powers without any hearing whatever, and without appellant being given

any opportunity to express its views to the Commission. Assuming that each of the three clauses to which we have referred relates to a distinct and separate situation, it is fairly clear that the second clause governs this matter. That clause takes care of a situation where a petition of some sort is filed with the Commission by reason of which the Commission is informed of a certain situation and makes an order relating thereto, without the party affected being made a defendant in a formal fashion. In this class of case, the order is not considered as having been made upon the petition of a party, although a petition or complaint or information has been filed with the Commission, from which it learns certain facts. Or, as said by this Court in

Skinner & Eddy Corporation vs. United States, 249 U. S. 557, 563:

> "The applications of these parties, filed in March, 1916, were doubtless instrumental in securing a reopening of the proceedings which resulted in the order complained of. But the proceedings in which the order was made were the original applications of carriers for relief under the Fourth Section."

In that case the same contention was made by the defendants as its made here, it being alleged that a certain petition filed by shippers residing in Washington and Nevada caused the issuance of the order, which could not be attacked in a district court of Oregon. So, in this case, while the complaint or petition filed by the M. & St. L., may have served to bring the matter more emphatically to the attention of the Commission, yet the order was made by the Commission upon its

own motion under its emergency power, or in any event, as a part of a proceeding which had extended over a considerable time and which involved, not only the complaint of the M. & St. L., in formal Docket 13110, but also the validity and power of a particular Tariff No. 40, filed by the appellant, appellant being a resident citizen of the Southern District of Illinois. For the Court will observe that while the first decision of the Commission (R. 33) is in a formal case brought by the M. & St. L., yet the second decision of the Commission (R. 40), is in an Investigation and Suspension case, dealing with intermediate switching charges at Peoria, and was brought about by the filing of tariffs by the appellant, a resident of the Southern District of Illinois.

Aside from the considerations we have mentioned, it will be noted that the order in this case is made under the so-called emergency powers of the Commission, granted to that body by Paragraph 15 of Section 1 of the Interstate Commerce Act (41 Stat. L. 476). The only power there conferred upon the Commission to make an order of this kind grows out of an emergency due to the shortage of equipment, congestion of traffic, or some matter of this character. The Commission is given power to make such an order, either upon complaint, or upon its own initiative without complaint. No answer or formal pleading is necessary, and the order may be made with or without notice. In this case the order was made without notice, and without hearing. The recital in the order is that it is in the public interest, that it is a public matter, and that it was necessary in order to prevent the interruption of commerce. Such an order cannot be said to be one that is made upon the petition of

any party. The interest of any particular party is secondary to the interest of the public. This feature of the matter is referred to in the opinion of the Court in this case, and it is correctly said that it may well be doubted if an emergency service order of this kind can ever be made upon the petition of a party, in the sense in which that term is used in the venue provision of the statute (R. 100). We contend, therefore, that the venue was properly laid in the Southern District of Illinois. Any other construction of the law would subject a litigant in the position in which appellant finds itself to unreasonable hardships. If this suit had been brought in the Southern District of Iowa, undoubtedly appellant would have been confronted with the contention that the order had not been made upon the complaint of the M. & St. L., and that the suit should have been brought where the matter arose, or where the appellant had its principal office, namely, in the Southern District of Illinois. Appellant had no notice of the filing of any complaint. At the time it found it necessary to bring this suit in court, it had not seen a copy of the complaint, as the Bill shows. It could not be certain that this informal, *ex parte* petition was of such a nature as to be the basis of the order in a legal sense. The order of the Commission does not recite that it is made upon the complaint of the M. & St. L. It merely recites that by reason of the petition of the M. & St. L., certain facts were brought to the attention of the Commission. Of course, the Commission must get its information from some source. The written petition or complaint of the M. & St. L. was no more effective to set in motion the Commission's machinery than would have been a verbal message delivered by the M. & St. L. to the

Commission. From the recitals in the Commission's order here under attack, it would appear that this order was made as much by reason of the information which the Commission had received from the appellant as from the information received from the M. & St. L. The order recites that certain information was received through the petition of the M. & St. L., and certain other information received by a notice given by appellant. Acting upon this information, and in the public interest, the Commission makes its order. We submit that the venue was laid properly in the district where the appellant had its principal operating office, and where the matter complained of arose.

B. Invalidity of Service Order 37.

1. No Power to Require Switching.

Coming now to the merits of the case, it is our contention that the Commission in promulgating Service Order 37 exceeded its power under the statute, in that it required appellant to perform a service in the matter of interchanging freight, deriving its assumed authority to make the order from the provisions of the Car Service Statute, which statute does not give to the Commission the right to make an order of this character. We contend, therefore, that since the Commission is an administrative body, exercising only such powers as are conferred upon it by Congress, this order, being in excess of such statutory power, is void and therefore not binding upon the carrier. If this contention is correct, appellant has a right to have the order adjudged void by the courts, and therefore enjoined and set aside.

It will be noted (R. 14) that the mandatory portion of the order reads as follows:

"That the Peoria and Pekin Union Railway Co. shall with reasonable promptness and diligence continue to interchange freight traffic between the Minneapolis and St. Louis Railroad Co. and connecting carriers, at the regularly established interchange points at and in the vicinity of Peoria, Ill."

It is necessary that we examine the entire order, and to some extent, at least, the orders of the Interstate Commerce Commission made previously, dealing with the general situation, in order to apprehend precisely what is required of appellant by the terms of this order. Service Order 37 recites in the preamble that a controversy exists between the M. & St. L. and appellant with regard to the terms under which appellant shall interchange freight traffic between the M. & St. L. and connecting carriers at Peoria. Reference is made to the formal complaint filed by the M. & St. L. under the Docket No. 13110. When we refer to the opinion and order of the Commission entered in this case (R. 33), we find a history of the controversy, and there learn that the question before the Commission was as to whether the appellant had a right to impose by tariff a charge of $4 per car for switching cars from and to the terminal of the M. & St. L., to and from the terminals of other lines. The service for which the charge was proposed was a switching service which contemplated that appellant should with its engine and crews switch cars over its, appellant's tracks, from and to points of interchange. This switching service included the use of tracks, engines, crews, coal, and everything necessary to operate a switch engine and perform a complete switching service. Referring again to Service Order 37 (R. 13), it appears

that under the Docket No. 14534, the Commission had entered upon a general investigation into the practices of appellant and other railroads with respect to this matter of switching. It further appears that the appellant had indicated to the M. & St. L., that unless appellant received pay for its switching service, it would decline to perform such service between the M. & St. L. and its connections. The service order contains a further recital (R. 13) that the M. & St. L. is not paying for such switching service, and is unwilling to pay for that service pending the determination of the controversy being adjudicated by the Commission. The order recites further that this refusal of appellant to perform this switching service, and the refusal of the M. & St. L. to pay any of the charges for this service, creates an emergency which requires immediate action by the Commission. The order recites (R. 14) that in order to promote the service in the interest of the public and the commerce of the people, and to prevent interference with the constant flow of interstate commerce, appellant is directed to continue to interchange freight as it had formerly done. It is therefore obvious that by the term "interchange freight" is meant the performance of switching service by the appellant.

We are not left in doubt as to the particular statute under which the Commission assumed to make this emergency order. In the answer of the Interstate Commerce Commission (R. 76), it is stated:

> "The Commission further alleges that its Service Order No. 37 was made and served upon plaintiff in accordance with the authority conferred and the duties imposed upon the Commission by Paragraph 15 of Section 1 of the Interstate Com-

merce Act, which is an emergency paragraph and authorizes the making and service of such orders without holding of formal hearings."

Again it is said in the 13th paragraph of this answer (R. 77):

> "Answering Paragraph 19 of the bill of complaint, the Commission denies that said service order No. 37 is illegal. On the contrary the Commission alleges that said order was made and served upon plaintiff in accordance with the authority conferred upon the Commission by the Interstate Commerce Act, including paragraph (15) of Section 1 of said act, and for the purpose of performing a duty imposed upon the Commission by that act."

In the order it is stated that it is made "best to promote the service in the interest of the public and the commerce of the people" (R. 14). This admission by the Commission in its answer and this recital in the order show clearly that the Commission finds its authority, if at all, in Paragraph 15, Section 1 of the Interstate Commerce Act (41 Stat. L. 476). Furthermore, it would appear that the order rests, very largely at least, upon Subsection (b) of this Paragraph 15. Indeed, it is not contended, nor will it be contended by appellees that there are any other provisions of the law which give to the Commission authority to make an order similar to this without a hearing and without notice to the interested parties. In order to determine, therefore, whether the order is in excess of the Commission's power, and thereby to test its validity, it is necessary to examine this Paragraph 15. To some extent, it may be necessary to consider Para-

graphs 10-17, inclusive, of Section 1 of the Interstate Commerce Act, these being the Sections which are commonly referred to as the "Car Service Act."

Directing our attention particularly to Paragraph 15, it will be found that the law provides that whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have power to do certain things. The first of these is thus stated:

> "To suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission."

It is obvious that this paragraph of the law has no application to the case in hand. The second power thus specifically conferred upon the Commission in emergency is the power

> "To make such just and reasonable directions with respect to car service, without regard to the ownership as between carriers of locomotives, cars and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable."

In view of the recitals in the Commission's service order here under attack, it is more than probable that the Commission found its alleged authority to make the order in question in this language of the statute.

It will be observed that the Commission has power to make just and reasonable directions with respect to car service. It is necessary to ascertain just what is meant by the term "car service" as that expression is used in the Act. If we turn back to Paragraph 10 we find this language:

> "The term 'car service' in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains by any carrier by railroad, subject to this Act."

It will be seen that the term "car service" has to do only with vehicles of transportation. Paragraph (b) under which authority here is sought, gives power to the Commission to determine the use, control, supply, movement, etc., of these vehicles of transportation. Obviously the reference is to cars, locomotives, and other vehicles. No power is here attempted to be conferred upon the Commission to require one railroad to perform a service for another. It is obviously the thought in the mind of the statute makers that times may come when it is necessary for one railroad which is suffering from a shortage of equipment, whether that equipment be cars or locomotives, to be allowed to use the cars and locomotives of another carrier, which may be well supplied with these vehicles. It was obviously not the purpose of Congress to require one carrier actually to perform a switching or other service for another carrier. Congress did not intend that the employees of one carrier should be forced into the service of another. To say that because the Com-

mission has power to allow a railroad to use or control vehicles of another, it may require one railroad to perform switching for another, is to extend the language far beyond its plain and natural meaning. If we take the term "car service" in its ordinary acceptation, as it is understood by railroad men and laymen alike, it would never occur to anyone that by the term "car service" there was meant the performance of actual transportation service by one carrier for another. The thought is perhaps made a little clearer by considering in this connection Subsection (c) of Paragraph 15, which gives to the Commission in time of such emergency the right

> "To require such joint or common use of terminals, including main line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing, find to be just and reasonable."

Considering Paragraphs (b) and (c) together, it is obvious that the Congress meant to give the Commission power to allow one carrier to use instrumentalities of another, whether these instrumentalities be vehicles, tracks or terminal facilities. It is a matter of common knowledge that in certain periods of extraordinary congestion, when traffic conditions were highly abnormal, the traffic of the country suffered because of the inability of certain railroads to handle traffic which was tendered them, due to a shortage of equipment and to the lack of necessary terminal facilities. At the same time, other railroads had perhaps a sur-

plus of such equipment, and ample room in its terminals for the handling of additional traffic. Congress meant to give to the Commission authority to allow one railroad to use the facilities of another in such an emergency, upon terms as to compensation which should be fixed by the Commission provided the parties were not able to agree upon such terms. But it is nowhere suggested in the law that the Commission is given the power to require a railroad to take its employees and its engines and go out and perform an actual switching service for another railroad. It is one thing for the Commission to say to the appellant in this case: "You must allow the M. & St. L. to use your engines," or "You must allow the M. & St. L. to run over your tracks and terminals in order to make delivery." It is quite another thing for the Commission to say to the appellant, as it has: "You must hire employees, pay out your money for their wages, supply your engines with coal and water at your own expense, and take those engines thus manned by your employees and supplied with fuel, and go and perform a switching service for the M. & St. L." The distinction between the power conferred by the Commission by the statute, and the power which the Commission sought to exercise in this case, is perfectly clear. If this power is upheld, it will mean, not merely that one railroad may use the equipment and the facilities of another, but that one railroad may call upon another to perform all the service which the law imposes upon the railroad making the demand. It is one thing for the Commission to say to the Baltimore and Ohio Railroad in the City of Washington that it must allow the Pennsylvania to have a certain number of its engines and cars, or to use its terminal facilities in Washing-

ton, and quite another thing for the Commission to say to the Baltimore and Ohio: "You must take your engines, manned by your crews, and perform a transportation service for the Pennsylvania Railroad." If we imagine that the Pennsylvania Railroad has a train load of traffic in the City of Washington to be transported to Philadelphia, it is one thing for the Commission to require the Baltimore and Ohio to furnish an engine to pull that traffic, and quite another thing for the Commission to require the Baltimore and Ohio Railroad to take that engine with the Baltimore and Ohio employees and actually haul the train to the City of Philadelphia.

In the instant case, the order of the Commission is that the appellant shall continue to perform interchange service. Whether such an order is wise, whether it is provident, whether it is just, whether it is in the public interest, is entirely beside the question. The question is one of statutory authority. It will hardly be contended that the Commission has general powers, such as are exercised by a court of equity, to make any sort of order which in its wisdom it sees proper to make, and which it thinks necessary to prevent interruption of traffic. To give the Commission power to permit one railroad to use the facilities of another is an extraordinary power. We are not arguing here against the constitutionality of the statute, particularly since such argument is unnecessary. We are contending, however, that the court cannot imply powers to the Interstate Commerce Commission beyond those which are expressly and explicitly conferred by the statute, particularly when the powers so exercised stretch almost to the line of unconstitutionality, if indeed they do not extend beyond that line. If the power here admitted to be asserted by the Commission is up-

held, there is no limit to the extent to which one railroad may be required to perform service for another in the matter of transportation. No railroad can be certain that it will be allowed to use exclusively its own employees in the conduct of its business. It may be required to give up its vehicles, but it certainly cannot be required to go farther and employ men to operate those vehicles for another.

2. Service Without Compensation.

We have dealt heretofore solely with the question of power without reference to the question of compensation. It will be noted, however, that the statute confers upon the Commission authority to allow the use of these vehicles, and the use of these terminal facilities, only upon such terms as to compensation as the parties may agree upon, or as the Commission may fix. Under this order no compensation is fixed by the Commission, nor is it provided that the Commission will fix the compensation provided the parties cannot agree. The inference rather is that the service is to be performed without compensation. We think this is a justifiable statement, in view of the fact that the order recites that the M. & St. L. has refused to pay any compensation and vigorously asserts that it is not liable for such compensation. Not a word is said in the Commission's report as to compensation. It is not provided, as the statute requires, that the parties shall either agree upon compensation, or refer the matter to the Commission. It will be observed that the statute makes the order conditioned upon the payment of compensation, but the order is absolute in its terms. It states that the appellant shall continue to interchange freight traffic between the M. & St. L. and connecting carriers. There is no qualification in

the order that this shall be done, provided compensation is paid, nor any provision that compensation will be determined later if the parties cannot agree. It is this phase of the order that leads to the contention in the Bill that the order as promulgated violates the Fifth Amendment to the Constitution of the United States, in that appellant is thereby deprived of his property without due process of law, and that its private property is taken for public use without just compensation. Obviously, the property is private. It is not necessary to cite authorities to convince the Court that the property of a railroad company is essentially private property, although it is dedicated in a sense to the public service. Having, therefore, all the qualities of private property, the Commission seeks by this order to devote this property to a public use without making any provision for compensation. Of course, it cannot be said that this infirmity exists in the statute, since the statute clearly provides for compensation, which compensation is to be fixed by the Commission, provided the parties cannot agree as to the amount. That the property is to be devoted to a public use, rather than to the private use of the M. & St. L., is clear from the recitals of the service order and from the terms of the statute under which this order is made. If the law is to be construed as permitting the Commission to take the private property of appellant and apply it to the private purposes and uses of the M. & St. L., obviously the statute would be unconstitutional. It can be upheld on constitutional grounds, only upon the theory that the use is a public one, and that the public interest demands that the property of the one carrier should be devoted to the purpose of the other. Therefore, since there is no provision in the order for the payment of compensation,

there is a clear violation of the provisions of the fifth amendment and particularly that portion of the amendment which prohibits the taking of private property for public use without compensation.

3. Limitations Upon Commission's Power.

It may be said that the order was necessary to prevent an interruption of traffic, that the public interest demanded that this quarrel between two railroad companies should not be allowed to interrupt the orderly flow of interstate commerce, that somewhere there should be power lodged in some public tribunal or court to keep uninterrupted this flow of commerce. If such be granted for the sake of the argument, it does not add anything to the validity of this order. For, if the appellant, in view of its public or charter obligations, fixed by sanctions of the law or the terms of its tariffs, was in duty bound to continue performing this service; if it be conceded that the courts had authority by means of injunction or mandamus, or otherwise to compel the doing of this service by the appellant, this in no way weakens our contention that this particular service order, issued as it was without specific grant of authority in the statute has no validity. The Commission is not a court. It has no general powers. It is not the general manager of all the railroads of the country. It can do only the things which Congress has authorized it to do.

The argument that public necessity should cause the courts to confer power upon the Commission by implication was earnestly urged upon this court very early in the history of rate regulation. In the beginning of the Commission's history, it undertook to perform many duties without specific authority which were alleged to be in the public interest. Reference may be had to the case of

Interstate Commerce Commission vs. Cincinnati, New Orleans and Texas Pacific Railway Co., 167 U. S. 409.

In this case the court was called upon to pass upon the question of whether the Commission had authority to fix maximum freight rates. The question had been decided previously by the court, but the case to which we refer goes more elaborately and carefully into the question, and presents a fuller discussion than can previously be found of the duty of the Commission and its power under the statute. When it was pointed out that the statute did not expressly confer upon the Commission authority to fix maximum freight rates, the answer was that it was necessary to infer this power in order that the Commission might function as an effective rate-regulating body. It was argued in substance that if the Commission declares a rate unreasonable, it should be allowed the right as a necessary corollary to fix the limit of unreasonableness, or, in other words, to establish a point beyond which the carrier could not go and at the same time observe the canon as to reasonableness. In a most elaborate opinion by Mr. Justice Brewer this view was utterly rejected. The court declined to extend this power by implication, holding, in effect, that before a power could be exercised by the Commission it must clearly be granted. While it is perhaps unnecessary to cite authority upon the proposition that the Commission cannot exceed its statutory power, yet we call attention to the case of

United States vs. Pennsylvania Railroad Co., 242, U. S. 208.

This is sometimes spoken of as the "Tank Car Case." In that case, there was involved the question of the power of the Commission to require the Pennsylvania Railroad to equip itself with a special type of equipment, namely tank cars in which to transport oil and other liquids of that character It was conceded, for the purpose of the argument that the statute required the carriers to furnish equipment, and it was further conceded that by reason of this provision of the statute the Commission had power to require a carrier to supply shippers with ordinary equipment. It was argued that the power to require a carrier to furnish ordinary box cars or ordinary coal cars, carried with it by necessary implication the power to require carriers to supply special types of equipment, such as tank cars. The court, however, in a most careful review of the situation by Mr. Justice McKenna, held that this power would not be inferred or implied, there being no expressed statutory authority giving this power to the Commission. These cases are simply familiar illustrations of the general principle that an administrative body such as the Interstate Commerce Commission must look to the statutes and there find a clear and express authority for any of the powers which it undertakes to exercise.

4. Order Violates Tariff.

There is another consideration which should be mentioned. It is alleged in the Bill, and admitted in the answer of the Interstate Commerce Commission that at the time the service order was issued, there was in effect a Tariff, No. 36, filed by the appellant with the Interstate Commerce Commission, imposing a charge of $4 per car for performing the identical switching service which the Interstate Commerce Commission by its service order required appellant to perform.

Although the Commission had held in its first decision (R. 33) that this charge was discriminatory because not imposed upon the Chicago, Burlington & Quincy and the Chicago, Rock Island and Pacific, it was not condemned as inherently unlawful, and appellant was permitted to remove the discrimination by making a similar reasonable charge against the Rock Island and the Burlington. The history of the controversy shows that the appellant undertook to remove the discrimination by filing its Tariff No. 40, imposing a similar charge upon these other two railroad companies. In its second decision in this case (R. 40), the Commission did not require the cancellation of this charge. So that, whatever infirmities may attend it, it was at the time of the issuance of the service order actually in effect and had never been required to be cancelled by the Commission. This is expressly admitted in the answer of the Interstate Commerce Commission. Thus it is said in that answer (R. 76):

> "Answering Paragraph 14 of the bill of complaint, the Commission admits that it made and entered its service order No. 37, and admits that the Tariff referred to is in effect and on file in the Commission's office, but the Commission denies each of and all of the other allegations contained in said paragraph, etc."

It will be seen, therefore, that the Commission is requiring the appellant to perform this service, although by the terms of the order, it is found as a fact that the M. & St. L. is refusing to pay the tariff charges and is asserting that it is not bound to pay such charges. We have, therefore, the extraordinary instance of the Commission requiring the appellant to violate its own

tariff and to perform a service without collecting therefor the tariff charge which under the law it is bound to collect.

It may be said that the Peoria & Pekin Union Railway should have continued to perform the switching service and sought its remedy by bringing an action at law against the M. & St. L. for the tariff charges. It is well settled, however, that a railroad company is not required to extend credit to a shipper. No one doubts the law to be that it is the right of a carrier to demand the prepayment of its charges. Particularly is this true where the shipper refuses to make payment and asserts his determination not to pay the tariff charges which are in effect. The same rule must perforce apply to the relations between one railroad company and another. It is the common practice of carriers where a railroad company is approaching insolvency or is in default of its settlements to insist upon what is commonly known as junction point settlements. That is to say, a solvent railroad dealing with an insolvent carrier or with a recalcitrant carrier with respect to charges may refuse to handle the freight from the junction point unless the charges are prepaid. While there is no suggestion in this record that the M. & St. L. is insolvent, yet the record and the service order show that it had notified the appellant that these charges would not be paid, and that it would insist upon the service being performed by the appellant without compensation.

That one carrier may refuse to handle traffic for another unless there is prepayment of the charges is stated without qualification by this Court in

Wadley Southern Railway Company vs. Georgia, 235 U. S. 651.

In this case there was involved the question of whether, as a matter of right under the Fourteenth Amendment, a railroad company could be penalized by a State Commission, acting under a State Law, for refusing to accept freight from one connection without prepayment of the freight charges while at the same time accepting freight from another connecting carrier without requiring prepayment. Of course, no such question is involved here, but in passing upon this question, Mr. Justice Lamar stated the general rule to be that a carrier may decline to receive freight from a shipper except upon prepayment of charges and that the same is true as between connecting railroads. In the case cited it was necessary for the Court to give some further consideration to the question of whether a State Commission had authority to rule that a railroad must treat all connections alike. That question is not here, but if it were, according to the weight of Federal authority, a railroad may demand prepayment of one carrier and waive this requirement as to another. See,

Gulf, Colorado, etc. Railway Company vs. Miami Steamship Company, 86 Fed. Rep. 407.

Authorities to the contrary are from the State Courts.

III. CONCLUSION.

If it should be contended that the Service Order in this case rests in any way upon the authority conferred upon the Commission in Section 3 of the Interstate Commerce Act (41 Stat. L. 479), and particularly Paragraph 4 thereof, which deals to some extent with the use of terminal facilities, the answer is that this

section does not confer any authority upon the Commission to make an emergency order upon the ex parte petition of an interested party and without notice to the other interested party or opportunity for being heard. But even if this section is considered applicable, it is certainly no broader as to the subject matter than the provisions of Paragraph 15 of Section 1. Nowhere does this Paragraph 4 of Section 3 assume to confer any authority upon the Commission to require the performance of switching service.

It may be said that Paragraph 3 of Section 3 has some bearing upon this case. That section makes it obligatory upon carriers to exchange traffic and to receive, forward, and deliver traffic received from connections. It is further provided in this paragraph that this interchange shall be without discrimination, but the Commission is given no power to enforce this section of the law in a summary manner by any emergency order issued without notice, or opportunity for the interested parties to be heard. Clearly, the only section of the law which is here involved is Paragraph 15 of Section 1.

For these reasons, we respectfully submit that the decree of the court below should be reversed and that appellant's prayer for a temporary injunction should be granted.

Respectfully submitted,

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

PEORIA & PEKIN UNION RAILWAY COMPANY
v.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY. } No. 318.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On January 8, 1923, the Interstate Commerce Commission (Tr. 49) entered an order for a general investigation into and concerning the lawfulness of the rates, charges, regulations, and practices of the Peoria & Pekin Union Railway, and railroads with which it connects at and in the vicinity of Peoria, Ill., as applied to traffic to, from, and via Peoria, including the lawfulness of existing contracts between the Peoria & Pekin Union Railway and the so-called tenants of that railroad; also the lawfulness of existing joint rates via Peoria, and the divisions thereof,

on traffic moving in connection with the Peoria & Pekin Union Railway, and the nature and extent of the facilities furnished and services rendered by any of the respondents to other of the respondents at or near Peoria, whether in make-up or break-up yards, spotting, intermediate, or terminal service, or otherwise including facilities furnished or services rendered in respect of traffic moving on combination rates which break on Peoria, and the compensation therefor as between respondents; with a view of determining just and reasonable individual and joint rates, charges, regulations, divisions, and practices and requiring establishment thereof by order.

By the same order two other closed cases were reopened and consolidated with the general investigation, and further hearings were fixed for February 20, 1923, at Chicago. (Tr. 50.) Notice was given to all of the interested carriers who were made respondents.

The previous cases and proceedings indicated that certain unsolved predominating questions necessitated for their final determination the general investigation.

First. Whether Peoria & Pekin Union Railway is a common carrier by railroad subject to the act to regulate commerce as found in the report of the Commission of April 13, 1922 (68 I. C. C. 412, 417; Tr. 33, 38); and if so—

Second. What service does it render as such, for whom, and what shall be the nondiscriminatory reasonable rates, fares, and charges therefor?

Third. Whether the tracks and facilities of Peoria & Pekin Union Railway are mere extensions of those of its tenant lines for whom it acts as agent (and not as a common carrier by railroad subject to the act) in conducting an underlying switching and terminal business as found in the report of the Commission of December 22, 1922. (77 I. C. C. 43, 49; Tr. 40, 46.)

Fourth. Under what circumstances does it act as agent for and perform an underlying terminal and switching service for its tenant lines, what compensation is paid therefor, by whom, and what favoritism or discrimination, if any, has been practiced in connection therewith?

Fifth.—What compensation is Peoria & Pekin Union Railway entitled to receive for the service which it renders and by whom and to whom is it payable?

Pending the final hearing and solution of these predominating questions the Peoria & Pekin Union determined to settle the whole matter for itself.

The Commission declared "an emergency is thereby created which requires immediate action of the Commission" (Tr. 14) and by Service Order No. 37 (Tr. 13) directed that Peoria & Pekin Union Railway "shall with reasonable promptness and diligence continue to interchange freight traffic between the Minneapolis & St. Louis Railroad Company and connecting carriers at the regularly established interchange points at and in the vicinity of Peoria" (Tr. 14).

Peoria is a railroad gateway located in central Illinois on the west bank of the Illinois River, which flows in a southerly direction. Pekin is located on the east bank of the river nine miles south of Peoria. Peoria & Pekin Union is located in what is commonly known as the Peoria-Pekin Switching District. On the west bank of the river it has a single track and on the east bank a double track (Tr. 34) between Peoria and Pekin, with terminal yards in Peoria, East Peoria, and points on the east bank of the Illinois River within the switching limits (Tr. 34).

The capital stock of Peoria & Pekin Union is jointly owned by the Illinois Central, C., C., C. & St. L., Lake Erie & Western, Chicago, Peoria & St. L., Chicago & North Western, and Toledo, Peoria & Western. These companies are known as the "tenant lines." (Tr. 34.) The Chicago & Alton and Pennsylvania companies have contracts with Peoria & Pekin Union under which the latter agrees to perform terminal services for them and under which they are granted certain rights to the use of the Peoria & Pekin Union facilities.

Minneapolis & St. Louis Railroad is a trunk line which enters Peoria from the west. ~~Its capital stock is owned by the Chicago & Alton and Rock Island Companies~~. Minneapolis & St. Louis formerly had a contract similar to those of the other companies named, which expired March 31, 1921. ~~Peoria & Pekin Union~~ declined to renew it but entered into a contract with the Rock Island whereby it uses the terminal facilities of that road at Peoria proper.

(Tr. 34.) Minneapolis & St. Louis and Peoria & Pekin Union have connections with the trunk lines at Peoria and Pekin and compete in the handling of both local and through traffic. Minneapolis & St. Louis can interchange traffic with all the trunk lines which enter Peoria proper except the Chicago & North Western without using Peoria & Pekin Union facilities. (Tr. 34.) The termini of the trunk lines serving Peoria from the south and east are at or near the East Peoria yards of Peoria & Pekin Union and traffic interchanged between those lines and the Minneapolis & St. Louis is handled by Peoria & Pekin Union.

Cars moving to Peoria over the rails of Minneapolis & St. Louis and going to tenant lines of Peoria & Pekin Union at East Peoria for outbound movement are delivered to Peoria & Pekin Union at Iowa Junction (Tr. 34), usually in trains with cars otherwise destined. These trains are switched by Peoria & Pekin Union to the East Peoria yards, where the trains are broken and the cars switched to designated tracks and placed in new trains for outbound movement. On this traffic Peoria & Pekin Union performs a train break-up, switching, and train make-up service. In the reverse direction Peoria & Pekin Union performs a similar service, except that it does not make up trains for Minneapolis & St. Louis, the cars being merely deposited in the latter's Bartlett Yards, situated just west of Iowa Junction. (Tr. 35.)

Cars moving to Peoria over the rails of Minneapolis & St. Louis, which are to move outbound via lines

which terminate at East Peoria, are taken in train lots by Minneapolis & St. Louis to Peoria & Pekin Union yards 90 and 91 in Peoria, about one mile from Iowa Junction. (Tr. 35.) Peoria & Pekin Union then switches the trains from yards 90 and 91 to the East Peoria yards, where they are broken up and the cars switched to appropriate tracks and placed in trains for outbound movement.

On August 30, 1921, Peoria & Pekin Union Railway established a charge of $4 for switching freight cars between the rails of Minneapolis & St. Louis at Peoria and its own tracks in its East Peoria yards when the cars come from or are destined to points beyond the switching district. On complaint of Minneapolis & St. Louis (Tr. 33) and after hearing, the Commission on April 13, 1922, found that Peoria & Pekin Union Railway (68 I. C. C. 417; Tr. 38)—

> * * * is an independent common carrier and as such entitled to just and reasonable compensation for the services which it renders. We are further of opinion and find that, with possibly the exception of traffic interchanged between protestant and the Chicago & North Western, defendant is not now compensated by the tenant lines for all of the service it renders in effecting transfers between those lines and nontenant lines, and may maintain reasonable tariff charges for such uncompensated service, provided in so doing it does not practice unlawful discrimination.
>
> Defendant performs interchange service between the rails of its tenants and the Chicago,

Burlington & Quincy and Chicago, Rock Island & Pacific and makes no charge for such service and receives no compensation therefor, except such as it receives under its contracts with its tenant lines. Complainant is in competition with the two lines mentioned in the handling of traffic from and to certain territories. Defendant, while stating that there is a distinction to be drawn between complainant and the two roads above mentioned, in that the latter have more extensive terminals at Peoria, does not attempt to justify in full the failure to make a charge on traffic interchanged with these roads, and states that negotiations are now under way looking to the securing of compensation from those lines for services for which it is not now compensated by its tenants. We are of opinion and find that the charges under consideration are unjustly discriminatory and unduly prejudicial against complainant and protestant.

On the same day the Commission entered an order directing the Peoria & Pekin Union Railway, on or before July 13, 1922, to remove the discrimination thus imposed on the Minneapolis & St. Louis. (Tr. 39.) Peoria & Pekin Union, on July 1, 1922, proposed to remove the discrimination by establishing similar charges for intermediate service on traffic to and from the Burlington and Rock Island. On the protest of the latter companies those tariffs were suspended. The previous case was then reopened and the two cases came on for further hearing. (77 I. C. C. 44; Tr. 40.)

On December 22, 1922, the Commission filed the second report (4 Commissioners dissenting and 1 absent) by which it again found (77 I. C. C. 48; Tr. 45):

> Should these tariffs become effective, where there are no joint rates and the combination rates break on Peoria, the charges will accrue against the traffic. The resulting increase of rates has not been justified, and this furnishes one ground for requiring the cancellation of the proposed schedules.
>
> There are other grounds for such action. The essential difficulty in this case is that what originally was primarily a terminal agency operating in a limited way within a limited territory has in the course of time expanded its facilities and enlarged the extent of the services it renders. The contracts under which it receives compensation from its proprietors, even should it assess and collect the proposed charges, are, by its own admission, insufficient to reimburse it fully for all the services it has in the past performed and now performs solely as their agent. Without first exacting adequate compensation from its proprietors or tenants by insisting upon a revision of the antiquated contract under which its compensation is fixed, it now contends that these services or certain of them are rendered by it as an independent common carrier, and seeks by tariff publication to exact compensation from nonproprietary connections.

There is here involved not only a very complicated concrete situation, but one which involves the fundamental question whether a common carrier may perform a service of common carriage as an agent for another common carrier, and if so, under what conditions as to the charges therefor, whether under contracts, or partly under contracts and partly by tariff publication. The unbroken construction put upon the interchange services of the Peoria & Pekin Union as well by its proprietors and tenants as by the respondent itself from February 1, 1881, until midsummer of 1921 is consistent only with the assumption that respondent in respect of these interchange services was exclusively an agent of its tenant lines and not a common carrier.

The Burlington has never paid anything to the respondent for interchange service. Until the present controversy the respondent never has claimed that it performed any service for the Burlington. Divisions with connections have always been arranged in conferences, at none of which has the Union ever been present. [Italics ours.]

Moreover, the local switching service, which the respondent performs on traffic originating or terminating at Peoria proper and moving via the tenant lines, is admittedly performed by the Peoria & Pekin Union, not as a common carrier but solely as an agent for its tenants.

Clearly the extent to which and the time during which the respondent acts as an agency and the extent and the time as to which it acts as a common carrier can not depend on its mere say-so. It can not for 40 years acquiesce in the rôle of agent and directly disclaim the responsibilities attaching to an independent common carrier, and immediately, upon its mere asservation as to its status or upon allegation or proof that it is not fully compensated by its principals for the service it has been claiming to perform as agent only, acquire the status of a common carrier and exert the latter's rights against connecting railroads.

In short, there is apparently something more necessary to clear up the situation here presented than the mere piecemeal filing of particular tariffs covering services now alleged to be those of a common carrier. We shall not prejudge the question of the status of the respondent nor the propriety of what rates or charges or divisions or practices should supplant the existing arrangements. In view of the determination made that these schedules have not been justified, it will suffice here to indicate that we shall on our own motion institute an investigation, making all parties to this case and all tenants of the Peoria & Pekin Union respondents, to the end that lawful, just, reasonable, and nonprejudicial practices, rates, and charges and divisions thereof shall be established for the services undertaken by them or any of them in connection with traffic moving to, from, through, or within the Peoria-Pekin district.

On the same day the Commission entered the order directing the Peoria & Pekin Union Railway, on or before January 31, 1923, to cancel the tariffs (Tr. 48), and a further order dismissing the complaint of the Minneapolis & St. Louis (Tr. 48).

The bill alleges that on January 2, 1923, after the Commission had suspended the tariff imposing charges against the Burlington and Rock Island companies, the Minneapolis & St. Louis served on Peoria & Pekin Union Railway Company notice that (Tr. 9)—

> In view of fact that order by I. C. C. in I. & S. Docket No. 1596 orders cancellation of tariffs carrying charges against Burlington and Rock Island and in view of fact that thereby discrimination as between this road and Burlington and Rock Island found to exist in original report in case No. 13110 is continued, this is to advise you that pending results of the general investigation in reference to practices, rates, and charges in connection with traffic moving from, through, to, or within the Peoria-Pekin District ordered by I. C. C. on its own motion the Minneapolis & St. Louis Railroad Company will refuse to make any further payments to your road under P. and P. U. Tariff I. C. C. No. 36 or any other tariff on account of switching charges on through traffic interchanged at Peoria with tenant lines of your road.

Telegraphic correspondence between the two companies and between the Peoria & Pekin Union and the Commission discloses that the Minneapolis & St. Louis, in view of the Commission's decisions and

the impending general investigation, declined to submit to the payment of the $4 per car which the Commission had found discriminatory and prejudicial. (Tr. 9.) By telegram the Commission reiterated that the charge against the Minneapolis & St. Louis was discriminatory and prejudicial so long as the Burlington and Rock Island were preferentially treated (Tr. 80) and asked assurance that traffic would not be interrupted during orderly disposition of questions. Peoria & Pekin Union Railway expressed hearty sympathy with the Commission's opinion that traffic should not be interrupted and, notwithstanding the Commission's finding (Tr. 82), denied there was any discrimination and prejudice against Minneapolis & St. Louis (Tr. 82).

On January 16, 1923, Peoria & Pekin Union wired the Commission that unless the Minneapolis & St. Louis made payment of the $4 per car for intermediate switching, Peoria & Pekin Union would, on and after January 20, 1923, accept cars from Minneapolis & St. Louis "for delivery to connections upon the payment of such charges in advance." (Tr. 83.)

On the sworn complaint of the Minneapolis & St. Louis (Tr. 52), which set out the controversy between it and Peoria & Pekin Union and its refusal to pay thereunder for the reasons stated, and that the refusal of Peoria & Pekin Union to receive traffic prejudiced the rights of the Minneapolis & St. Louis and flagrantly violated the right of the public to have the avenues of commerce open and operating (Tr. 97), the Commission issued the emergency order.

The bill was then filed. After hearing it was dismissed on the merits with a full opinion of the District Court (Circuit Judge Page and District Judges English and FitzHenry concurring). This appeal was then taken.

ARGUMENT.

I.

THE EMERGENCY ORDER WAS ENTERED ON THE PETITION OF MINNEAPOLIS & ST. LOUIS RAILROAD, A RESIDENT OF IOWA, AND THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS WAS WITHOUT JURISDICTION.

Urgent deficiencies act, October 22, 1913; c. 32, 38 Stat. 208, 219, provides:

> The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made.

The commerce court act provides (36 Stat. 539, 542):

> SEC. 3. Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the commerce court against the United States.
>
> * * * * *
>
> SEC. 5. The Attorney General shall have charge and control of the interests of the Government in all cases and proceedings in the commerce court and in the Supreme Court of the United States upon appeal from the commerce court.
>
> * * * * *

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto, of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party.

* * * * *

Communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the terms of this act * * * relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof.

Urgent deficiencies act provides (38 Stat. 220):

The procedure in the district courts, in respect to cases of which jurisdiction is conferred upon them by this act, shall be the same as that heretofore prevailing in the commerce court * * *. No interlocutory injunction suspending or restraining the enforcement, operation or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or

district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application.

The Congress has specifically provided in what manner the United States may be sued. It is settled that the United States can not be sued except with its consent and on its own terms. *Minnesota* v. *Hitchcock*, 185 U. S. 373, 386; *Oregon* v. *Hitchcock*, 202 U. S. 60; *United States* v. *Lee*, 106 U. S. 196, 207; *Kansas* v. *United States*, 204 U. S. 331, 341.

In the outset the Government filed a sworn answer specifically denying the allegation of the bill "that said Service Order No. 37 was not made upon the petition of any party or parties." (Tr. 50, 51.) The answer further alleged that the order was made on the petition of the Minneapolis & St. Louis Railroad, a copy of which was attached as Exhibit A. (Tr. 51, 52.) Minneapolis & St. Louis is a railroad corporation with its residence in the judicial district of the Southern District of Iowa. Documents were also filed to substantiate that allegation of the answer. (Tr. 56, 57, 67, 70.)

The original proceeding was commenced by the Minneapolis & St. Louis Railroad against Peoria & Pekin Union Railway Company. (Tr. 33.) In the order directing the general investigation there is no reference whatever to the exercise by the Commission of its emergency powers. (Tr. 49.) The filing of the bill in equity, the hearing in the District Court, and

this appeal, would never have been heard of had it not been for the filing before the Commission, on January 6, 1923, of the sworn complaint and application of the Minneapolis & St. Louis (Tr. 51, 52), which merely referred to the prior proceedings. Minneapolis & St. Louis invoked the aid and assistance of the Commission and asked that it exercise the emergency and other powers with which the law has surrounded the Commission, and that the Peoria & Pekin Union may be ordered, directed, and compelled to continue to handle the cars of Minneapolis & St. Louis in interchange at Peoria (Tr. 51, 55.)

Service Order No. 37 itself recites the filing of the complaint and application and the substance thereof as the basis for the order, thus (Tr. 13, 14):

> And it further appearing that a petition has been filed with the commission by the said Minneapolis & St. Louis Railroad Company from which it appears that the Peoria and Pekin Union Railway Company has indicated to it that unless certain claimed payments are made for certain claimed services performed by the said Peoria & Pekin Union Railway, it will refuse to interchange freight traffic between said Minneapolis & St. Louis Railroad and its connections at and in the vicinity of Peoria, Ill.;
>
> And it further appearing by said petition that the said Minneapolis & St. Louis Railroad Company is not now paying and is unwilling to pay any charges for the claimed service performed by the said Peoria & Pekin Union Rail-

way pending determination by this Commission of the controversy hereinbefore referred to;

And it further appearing that subsequent notice has been given to this Commission and to the Minneapolis & St. Louis Railroad Company that unless such claimed payments are made promptly it will discontinue to interchange freight traffic between the said Minneapolis & St. Louis Railroad and connecting carriers at and in the vicinity of Peoria, Ill., on and after 12 m. January 20, 1923;

And it further appearing that by reason of said notice of refusal of the Peoria & Pekin Union to interchange such traffic between said Minneapolis & St. Louis Railroad and connecting carriers, whether such traffic moves under joint or combination rates, and by reason of the refusal of the Minneapolis & St. Louis Railroad to pay any charges for the claimed services performed by the Peoria & Pekin Union Railway in interchange of such traffic, an emergency is thereby created which requires immediate action of the Commission.

Therefore, in order best to promote the service in the interest of the public and the commerce of the people, and in order that the constant flow of interstate commerce may not be interfered with, it is ordered and directed, effective forthwith and until the further order of the commission in the premises:

1. That the Peoria & Pekin Union Railway Company shall with reasonable promptness and diligence continue to interchange freight traffic between the Minneapolis & St. Louis Railroad Company and connecting carriers at

the regularly established interchange points at and in the vicinity of Peoria, Ill.

If Service Order No. 37 was not entered upon that complaint and application, on what was it entered? The prior proceedings pending before the Commission and the general order for the investigation are but incidental to the complaint and application which set in motion the emergency powers of the Commission. The fact that the Commission and the parties had conducted two proceedings which had been twice closed and again reopened by the order for the general investigation (Tr. 50), and which had informed the Commission to a considerable extent of the situation as outlined in the complaint and application for the emergency order, does not overthrow the statute prescribing the venue.

The words in the statute, "upon whose *petition* the order was made," are clear and unmistakable. While all that preceded the filing of the complaint and application for the emergency order might well be considered as information which justified the exercise of the emergency power, the order was not entered in those proceedings.

In *Illinois Central Railroad Co.* v. *Public Utilities Commission*, 245 U. S. 493, 504, 505, this Court said:

> The cross bills assailed the validity of the Commission's order on various grounds and concluded with a prayer that it be set aside and annulled and that the United States and the Commission be enjoined from enforcing it and the carriers from complying with it. Passing the fact that they were presented as

> *cross* bills, it is apparent that in subject matter and purpose they were suits to set aside the order. By statute such suits are required to be brought against the United States, Jud. Code, §§ 208, 211; c. 32, 38 Stat. 219–220, and the jurisdictional provision before mentioned permits them to be brought only in designated districts. Here the Eastern District of Missouri was the one designated, the order being one that was made upon the petition of a resident of that district. The United States had consented to be sued there, but not elsewhere, and, being suable only by its consent, could not be sued in a district not within the consent given. See *Finn* v. *United States*, 123 U. S. 227, 232–233; *Schillinger* v. *United States*, 155 U. S. 163, 166.
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> * * * * *
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> * * * the United States is made by statute a necessary party to a suit to set aside an order of the Commission, and this means that it is to stand in judgment as representing the public. If the state authorities thought the order should be set aside and wished to test their right to affirmative relief along that line they should have resorted to the court empowered by law to entertain a suit of that nature.

Skinner & Eddy Corporation v. *United States*, 249 U. S. 557, 563, relied on by opposing counsel, is not controlling here. In that case this Court said (249 U. S. 563):

> *Second.* The defendants contend also that if the subject matter was within the jurisdic-

> tion of a District Court of the United States it was not within that of Oregon. The objection is based upon the Act of October 22, 1913, c. 32, 38 Stat. 208, 219, which declares: "The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made." And it is asserted that the parties upon whose petition the order was made, are the Merchants' Association of Spokane, a resident of the Eastern District of Washington, and the Railroad Commission of Nevada, a resident of the District of Nevada. The applications of these parties, filed in March, 1916, were doubtless instrumental in securing a reopening of the proceedings which resulted in the order complained of. But the proceedings in which the order was made were the original applications of carriers for relief under the fourth section. The report and the order are entitled "In the Matter of Reopening Fourth Section Applications." One of the carriers which had made such application for relief from the provisions of the fourth section was a resident of Oregon, namely, the Oregon-Washington Railroad and Navigation Company; and as it was joined as defendant in the suit, the District Court for Oregon had jurisdiction over the parties.

In that case the court emphasized that the "report and the order are entitled 'In the Matter of Reopening Fourth Section Applications.'" In this case the

order bears the caption of no proceeding and is styled "Service Order No. 37."

In that case the Court said: "The applications of these parties, filed in March, 1916, were doubtless instrumental in securing a reopening of the proceedings which resulted in the order complained of." In the instant case the complaint and application for the emergency order appears not to have been filed in any of the prior proceedings. It was addressed directly to the Commission and it prayed for specific relief. It was not a reopening or continuance of any prior proceeding, but the commencement of a new proceeding.

If the contention of opposing counsel is sound, it practically defeats the Congressional intent with respect to venue.

Section 5 of the Act to Regulate Commerce, approved June 29, 1906, amending Section 16 of the act approved February 4, 1887 (34 Stat. 584, 592), provides:

> The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be *in the district where the carrier against whom such order or requirement may have been made has its principal operating office*, and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating

> office, * * * and jurisdiction to hear and determine such suits is hereby vested in such courts.

Under that statute railroad companies invariably commenced suits in the districts wherein were located their principal operating offices, which were usually far away from the shippers or localities who had secured the orders. Thus if a complaint were filed by shippers at St. Paul or Omaha against a group of carriers which included the Pennsylvania Railroad and New York Central companies and the Commission entered an order which the carriers undertook to enjoin, the suit could have been brought in New York or Pennsylvania.

The instant case is a striking example of the old practice. Practically the entire line of the Minneapolis & St. Louis is located west of the Mississippi River, and that company and its shippers are deprived of the right to have their case heard and determined in the district of which the company is a resident. The Commerce Court Act was passed to meet such conditions. When the Urgent Deficiencies Act, which abolished the Commerce Court, was passed, the Congress simply turned end for end the old practice and compelled any carrier who sought to enjoin an order of the Commission to bring the suit in the district wherein was the residence of the party "on whose petition the order was made."

The learned District Court said (Tr. 100):

> There was no hearing whatever upon the Minneapolis & St. Louis petition of January 6th, and the only petition or complaint of the

> Minneapolis & St. Louis Railroad Company mentioned in the order is No. 13110, filed September 22nd, 1921, and which had been dismissed prior to the entry of Service Order No. 37, so that we are of opinion that Service Order No. 37 was not entered on the complaint or petition of the Minneapolis & St. Louis Railroad Company.

The complaint and application of the Minneapolis & St. Louis for an emergency order is fully recited in Service Order No. 37. The contents of the recitals of that order are made up almost entirely from the complaint and application; the two documents are interwoven. Without the complaint and application for an emergency order Service Order No. 37 would not have been entered. The Commission would not have entered that order on its own motion. Service Order No. 37 was not issued in the general investigation proceeding. It was issued in direct response to a petition styled *The Minneapolis & St. Louis Railroad Company*, Complainant, *vs. Peoria & Pekin Union Railway Company*, Respondent (Tr. 52).

Counsel for appellant say that the written petition or complaint of the Minneapolis & St. Louis was no more effective to set in motion the Commission's machinery than would have been the verbal message delivered by the Minneapolis & St. Louis to the Commission. (Br. 22.) That question, however, is not in the case. The complaint and application of Minneapolis & St. Louis and Service Order No. 37 speak for themselves. The decision of the Court will rest on their effect.

Opposing counsel further argue that the Government failed to appeal or to assign errors; therefore it is in no position to urge the question of lack of jurisdiction.

In *Procter & Gamble Co.* v. *United States,* 225 U. S. 282, the Commerce Court overruled the Government's challenge of its jurisdiction but held in favor of the Government on the merits of the case and dismissed the petition. On the appeal of the Procter & Gamble Company (but without appeal of the Government) this Court reversed the judgment with directions to dismiss the petition for want of jurisdiction.

Similarly, in *Skinner & Eddy Corporation* v. *United States,* 249 U. S. 557, the question of jurisdiction was raised in the District Court and overruled, but the bill was dismissed on the ground that it failed to state any cause of action. Skinner & Eddy Corporation appealed. The question of jurisdiction of the District Court was heard and determined by this Court without appeal by the Government.

The question of jurisdiction in the instant case was seasonably raised and determined adversely by the District Court. If the order of the Commission was entered on the complaint and application of the Minneapolis & St. Louis within the meaning of the venue statute, then the District Court was clearly without jurisdiction over the subject matter, which could not be conferred by consent or otherwise. The question is properly here for review. The court could raise the question *ex mero motu.*

II.

SERVICE ORDER NO. 37 WAS WITHIN THE POWER OF THE COMMISSION.

The appeal was from the order denying motion of Peoria & Pekin Union for a temporary injunction. Other than the answer raising the question of jurisdiction, the Government filed no pleading at the hearing of the motion. However, counsel for the Government, in addition to arguing the question of jurisdiction, also argued the case on the merits in opposition to the motion. The opinion of the District Court disposes of all questions on the merits and an affirmance by this Court would end the case.

Section 400 of the Transportation Act amending the first four paragraphs of Section 1 of the Interstate Commerce Act provides (41 Stat. 456, 474):

> (3) * * * The term "railroad" as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentali-

ties and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

* * * * *

(4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

Section 402 of the Transportation Act amending section 1 of the Interstate Commerce Act, provides (41 Stat. 476):

(10) The term "car service" in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, in-

cluding special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act.

* * * * *

(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine, (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in

> its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

The learned counsel for Peoria & Pekin Union say (Br. 31):

> To give the Commission power to permit one railroad to use the facilities of another is an extraordinary power. *We are not arguing here against the constitutionality of the statute, particularly since such argument is unnecessary.* [Italics ours.]

The court will take judicial notice that Illinois is a coal-producing State and that coal is one of the greatest of all necessities which moves in heavy volume through all of the large terminals. All that the Commission did was to keep open a channel of interstate commerce in midwinter when there was a heavy movement of freight including coal.

On August 30, 1921, appellant established the charge of $4 per car which the Commission, by its order of April 13, 1922 (Tr. 39), condemned as discriminatory. Minneapolis & St. Louis, in its complaint and application for an emergency order, alleges that up to January 2, 1923, it paid the charge of $4 per car under the discriminatory and prejudicial tariff on all cars in eastbound interchange because it was satisfied Peoria & Pekin Union would refuse traffic in interchange, thus interfering with the flow of interstate commerce and cause great money loss to Minneapolis & St. Louis and damage to its business and patrons, if it refused to pay the charge. (Tr. 53, 54.)

After having paid a sum in excess of $210,000 and being unable to stand the burden longer, Minneapolis & St. Louis gave notice of its intention not to make further payments. As the Burlington and Rock Island companies were not paying similar charges and as the Peoria & Pekin Union had not filed any bill to enjoin the order of the Commission which condemned the tariff fixing the $4 charge as discriminatory and prejudicial, it certainly was in no position to exact those charges from the Minneapolis & St. Louis. Peoria & Pekin Union has already received $210,000 and its inability longer to collect charges under the condemned tariff does not justify its outcry of confiscation. (Tr. 54.)

It is difficult to understand wherein the order which directs that a channel of interstate commerce which has been open and in operation for 40 years shall be kept open is an appropriation of terminal

facilities. The record more nearly discloses an attempt on the part of Peoria & Pekin Union to confiscate and destroy the property of Minneapolis & St. Louis. To do that it is willing to go to the extreme of switching for the Burlington and Rock Island free of charge as it did for the Minneapolis & St. Louis (except as it received payments under the tenancy contracts) for 40 years.

In any case, counsel for appellant do not assail the validity of the statute. The Commission is investigating the subject to the end that if the carriers disagree upon the terms of compensation, the Commission may, under the statute, after subsequent hearings fix such compensation as may be just and reasonable. Appellant should not object to a short further continuance of its own 40 years' practice.

In *Pennsylvania Company* v. *United States*, 236 U. S. 351, 369, 371, the company refused to make certain reciprocal switching arrangements at New Castle for the cars of Buffalo, Rochester & Pittsburgh Ry., such as it had made with the Baltimore & Ohio and other companies. The Commission directed the Pennsylvania to cease and desist from the practice and the Pennsylvania brought suit to enjoin. The District Court denied application for temporary injunction and in affirming the decree this Court said:

> The third and last objection is that the effect of the order of the Commission is to appropriate the property of the Pennsylvania

Company without compensation to the use of the Rochester Company, in violation of the Constitution of the United States. Certainly the railroad can not maintain, in view of the provisions of the statute to which we have referred, that these terminal facilities are exempt from public regulation and under all circumstances subject to its own control, to be dealt with in such manner as it may see fit. This court recognized, in the case of *United States* v. *Terminal R. R. Ass'n*, 224 U. S. 383, that terminal facilities might be so used as to create monopolies, which it was within the power of Congress to control, a power which it might exercise within the prohibitions and limitations of the Sherman Act. So in the present case, all that the order requires the Pennsylvania Company to do is to receive and transport over its terminals by its own motive power, for the Rochester Company, as it does for other companies similarly situated, carload freight in the course of interstate transportation.

* * * * *

So here there is no attempt to appropriate the terminals of the Pennsylvania Company to the use of the Rochester Company. What is here accomplished is only that the same transportation facilities which are afforded to the shipments brought to the point of connection over tracks used in common by the Baltimore & Ohio Railroad and the Rochester Company, shall be rendered to the Rochester Company as are given to the Baltimore & Ohio

> Company under precisely the same circumstances of connection for the transportation of interstate traffic. All that the Commission ordered was that the Company desist from the discriminatory practice here involved, and in so doing we think it exceeded neither its statutory authority nor any constitutional limitation, and that the District Court was right in so determining.

Peoria & Pekin Union apparently stands not only in defiance of the order of the Commission but it undertakes to go to the extreme of shutting the Minneapolis & St. Louis out of the terminals entirely because the latter would not continue to pay a switching charge of $4 condemned as discriminatory and prejudicial. It now assails the emergency order of the Commission which compels it to keep its terminals open under a statute the validity of which is not questioned.

The language of the learned District Court is appropriate (Tr. 101, 102):

> It is alleged and not disputed that the identical service commanded by the order has been performed for more than forty years by plaintiff for the Burlington and Rock Island without any compensation being asked, and that that is the identical service which the Minneapolis & St. Louis is asking shall be performed for it without compensation. Of course that could not be the basis for taking plaintiff's property without compensation, but it does present a very strong

argument why the public should not be inconvenienced and suffer a discontinuance of that service while the Interstate Commerce Commission is investigating the question as to whether such a service should be compensated for, and, if so, what shall be the basis of the compensation.

The decree of the District Court should be affirmed.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

PEORIA & PEKIN UNION RAILWAY COMPANY, appellant,
v.
THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al., appellees.
No. 318.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

STATEMENT OF THE CASE.

This is an appeal from a decree of the United States District Court for the Northern Division of the Southern District of Illinois, Circuit Judge Page and District Judges English and Fitz Henry sitting (Rec. 102), denying a temporary injunction sought by the Peoria & Pekin Union Railway Company, appellant, to restrain the Interstate Commerce Commission and the United States, appellees, from enforcing the terms of the following order (R. 13) entered by Divi-

sion 5 of the Commission pursuant to the emergency provisions of the interstate commerce act:

SERVICE ORDER No. 37.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 18th day of January, A. D. 1923.

The subject of routing freight traffic being under consideration, and it appearing that a controversy exists between the Minneapolis & St. Louis Railroad Company and the Peoria & Pekin Union Railway Company over the terms under which the said Peoria & Pekin Union Railway shall interchange freight traffic between the Minneapolis & St. Louis Railroad Company and connecting carriers at and in the vicinity of Peoria, Ill., which has been brought to the attention of the Commission by formal complaint filed by said Minneapolis & St. Louis Railroad under No. 13110;

And it further appearing that on the 8th day of January, 1923, the Commission, by order No. 14534, entered upon a general investigation into and concerning the lawfulness of the rates, regulations, and practices of the Peoria & Pekin Union Railway Company and railroads with which it connects at and in the vicinity of Peoria, Ill.;

And it further appearing that the complaint of said Minneapolis & St. Louis Railroad Company under No. 13110 has been reopened and consolidated with said general investigation under No. 14534;

And it further appearing that a petition has been filed with the Commission by the said Minneapolis & St. Louis Railroad Company from which it appears that the Peoria & Pekin Union Railway Company has indicated to it that unless certain claimed payments are made for certain claimed services performed by the said Peoria & Pekin Union Railway it will refuse to interchange freight traffic between said Minneapolis & St. Louis Railroad and its connections at and in the vicinity of Peoria, Ill.;

And it further appearing by said petition that the said Minneapolis & St. Louis Railroad Company is not now paying and is unwilling to pay any charges for the claimed service performed by the said Peoria & Pekin Union Railway pending determination by this Commission of the controversy hereinbefore referred to;

And it further appearing that subsequent notice has been given to this Commission and to the Minneapolis & St. Louis Railroad Company that unless such claimed payments are made promptly, it will discontinue to interchange freight traffic between the said Minneapolis & St. Louis Railroad and connecting carriers at an in the vicinity of Peoria, Ill., on and after 12 M. January 20, 1923;

And it further appearing that by reason of said notice of refusal of the Peoria & Pekin Union to interchange such traffic between said Minneapolis & St. Louis Railroad and connecting carriers, whether such traffic moves under joint or combination rates, and by

reason of the refusal of the Minneapolis & St. Louis Railroad to pay any charges for the claimed services performed by the Peoria & Pekin Union Railway in interchange of such traffic, an emergency is thereby created which requires immediate action of the Commission.

Therefore, in order best to promote the service in the interest of the public and the commerce of the people, and in order that the constant flow of interstate commerce may not be interfered with, it is ordered and directed, effective forthwith and until the further order of the Commission in the premises:

1. That the Peoria & Pekin Union Railway Company shall with reasonable promptness and diligence continue to interchange freight traffic between The Minneapolis & St. Louis Railroad Company and connecting carriers at the regularly established interchange points at and in the vicinity of Peoria, Ill.

2. That copies of this order be served upon the Peoria & Pekin Union Railway Company; Peoria Railway Terminal Company and W. G. Bierd and H. I. Battles, Receivers; the Minneapolis & St. Louis Railroad Company; the Chicago, Burlington & Quincy Railroad Company; the Chicago, Rock Island & Pacific Railway Company; the Chicago & Alton Railroad Company and William W. Wheelock and William G. Bierd, Receivers; Toledo, Peoria & Western Railway Company and S. M. Russell, Receiver; Illinois Central Railroad Company; the Atchison, Topeka & Santa Fe Railway Company; the Lake Erie & Western Railroad Company; the Cleveland, Cincinnati, Chicago

& St. Louis Railway Company; Chicago, Peoria & St. Louis Railroad Company and Bluford Wilson and William Cotter, Receivers; Chicago & North Western Railway Company; the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; and St. Louis, Springfield & Peoria Railroad; and that notice of this order be given to the general public by depositing a copy hereof in the office of the Secretary of the Commission at Washington, D. C.

By the Commission, division 5:

GEORGE B. MCGINTY,
Secretary.

PROCEEDINGS BEFORE THE COMMISSION LEADING UP TO ISSUANCE OF SERVICE ORDER NO. 37.

Appellant, an Illinois corporation, operates a railway switching line between Peoria and East Peoria, Ill., and points in the vicinity of these two places. The rails of this company connect, on the west side of the Illinois River at or near Peoria, with the rails of the Minneapolis & St. Louis Railroad Company, the Chicago, Burlington & Quincy Railroad Company, the Chicago, Rock Island & Pacific Railway Company, the Chicago & North Western Railway Company, Toledo, Peoria & Western Railway Company, and the Peoria Railway Terminal Company, and connect, on the east side of the Illinois River at or near East Peoria, with the rails of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Toledo, Peoria & Western Railway Company, Chicago, Peoria & St. Louis Railroad Company, Pennsylvania Railroad Company, Lake Erie & Western

Railroad Company, Chicago & Alton Railroad Company, the St. Louis, Springfield & Peoria Railroad, and Illinois Central Railroad Company. (R. 42, 43.) By reason of certain contracts, which are believed to be immaterial in this proceeding, the railroads mentioned, other than the Minneapolis & St. Louis Railroad Company, Chicago, Burlington & Quincy Railroad Company, the Chicago, Rock Island & Pacific Railway Company, Peoria Railway Terminal Company, and St. Louis, Springfield & Peoria Railroad, are known as tenants of appellant and for convenience will be so referred to in this brief. (R. 43, 79.)

Through traffic moving from or to the rails of the Minneapolis & St. Louis Railroad Company at Peoria, to or from the rails of the other railroads mentioned, at or near East Peoria, must be transported over the rails owned or used by appellant. At the time the Commission's service order was issued the Minneapolis & St. Louis Railroad and other railroads operating in and in the vicinity of Peoria had established through routes and through rates from points on and beyond the line of the Minneapolis & St. Louis Railroad Company to points on or beyond the lines of such other carriers, and in the reverse direction, and appellant, as a common carrier, participated in the transportation service over such through routes and under such through rates by hauling traffic between the rails of the Minneapolis & St. Louis Railroad Company in Peoria and appellant's yards in East Peoria. (R. 5, 38, 75, 87.)

By its tariff, I. C. C. No. 36, effective August 30, 1921, appellant filed with the Commission and published—

> intermediate switching rates on all freight cars coming from or destined to points beyond the Peoria-Pekin switching district regardless of origin or destination, except empties on which this company [appellant] receives a loaded haul one way. Intermediate service only. Apply following rates in dollars and cents per car between track connection with Minneapolis & St. Louis Railroad and Peoria and Pekin Union Railway tracks in East Peoria yards. Rate per car $4.00 (see note).
>
> NOTE.—Will not apply to switching service for tenant companies under tenancy contracts. (R. 75, 78.)

The Minneapolis & St. Louis Railroad Company, being called upon to pay this charge, filed with the Commission, on September 22, 1921, a complaint attacking the charge as unreasonable and unjustly discriminatory. (R. 33, 89.) The Commission, after a full hearing upon this complaint in Docket No. 13110, and in another docket, I. & S. No. 1455, involving proposed intermediate charges on similar traffic interchanged with the Peoria Railway Terminal Company, found (68 I. C. C. 412):

> We are of the opinion and find that defendant [appellant] is an independent common carrier and as such entitled to just and reasonable compensation for the services which it renders.

We are further of opinion and find that, with possibly the exception of traffic interchanged between protestant [Peoria Railway Terminal Company] and the Chicago & North Western, defendant is not now compensated by the tenant lines for all of the service it renders in effecting transfers between those lines and nontenant lines, and may maintain reasonable tariff charges for such uncompensated service, provided in so doing it does not practice unlawful discrimination.

Defendant performs interchange service between the rails of its tenants and the Chicago, Burlington & Quincy and Chicago, Rock Island & Pacific Railroads, and makes no charge for such service and receives no compensation therefor except such as it receives under its contracts with its tenant lines. Complainant [Minneapolis & St. Louis Railroad Company] is in competition with the two lines mentioned in the handling of traffic from and to certain territories. Defendant, while stating that there is a distinction to be drawn between complainant and the two roads above mentioned in that the latter have more extensive terminals at Peoria, does not attempt to justify in full the failure to make a charge on traffic interchanged with these roads, and states that negotiations are now under way looking to the securing of compensation from those lines for services for which it is not now compensated by its tenants. We are of opinion and find that the charges under consideration are unjustly discriminatory and

> unduly prejudicial against complainant and protestant.
>
> The records are not sufficiently developed to justify an expression of opinion as to what would constitute reasonable charges, * * *. (R. 38.)

On the same day the Commission ordered appellant to "cease and desist, on or before July 13, 1922, and thereafter to abstain from practicing the unjust discrimination" found in its report and "to establish, on or before July 13, 1922, * * * and thereafter to maintain charges or practices * * * which will avoid and prevent the unjust discrimination and undue prejudice found to exist in said report." (R. 39.) The proposed schedules applicable on traffic interchanged with the Peoria Railway Terminal Company were ordered canceled. (R. 40.)

By tariff I. C. C. 40, to become effective July 1, 1922, appellant proposed to remove the discrimination found by the Commission by publishing a charge for intermediate service on traffic to and from the Chicago, Burlington & Quincy Railroad Company and the Chicago, Rock Island & Pacific Railway Company, on the one hand, and appellant's "track connections with connecting lines in East Peoria yards," on the other hand. (R. 41, 75, 78.) The tariff also proposed changes in the charges formerly proposed on traffic to and from the Peoria Railway Terminal Company from and to the East Peoria yards. Upon protest of the three carriers

last mentioned the Commission, in I. & S. Docket No. 1596, suspended the tariff before it became effective. Upon petition of the Minneapolis & St. Louis Railroad Company, No. 13110 was reopened for further hearing in connection with I. & S. No. 1596. (R. 41.)

On December 22, 1922, the Commission, after hearings in both cases, found (77 I. C. C. 43) that the proposed charges in appellant's tariff I. C. C. No. 40 were not justified. The Commission in its report said:

> In short, there is apparently something more necessary to clear up the situation here presented than the mere piecemeal filing of particular tariffs covering services now alleged to be those of a common carrier. We shall not prejudge the question of the status of the respondent, nor the propriety of what rates or charges or divisions or practices should supplant the existing arrangements. In view of the determination made that these schedules have not been justified it will suffice here to indicate that we shall on our own motion institute an investigation, making all parties to this case and all tenants of the Peoria & Pekin Union respondents, to the end that lawful, just, reasonable, and nonprejudicial practices, rates, and charges, and divisions thereof, shall be established for the services undertaken by them or any of them in connection with traffic moving to, from, through, or within the Peoria-Pekin district. * * *
>
> In view of the investigation to be undertaken we shall here make no finding in No.

> 13110, and shall issue a formal order of dismissal in that case, without prejudice to recanvassing the situation there involved in the course of the investigation aforesaid.
>
> We find the proposed schedules have not been justified, and an appropriate order will be entered. (R. 46.)

The commission on the same day entered its order in I. & S. No. 1596, requiring appellant to cancel its tariff I. C. C. No. 40 on or before January 31, 1923, and entered its order in No. 13110 dismissing the complaint in that proceeding. (R. 48.)

On January 4, 1923, the president of appellant sent the following telegram to the Secretary of the Commission:

> Commission decision I. and S. Docket Fifteen Ninety Six original report thirteen one ten stop Minneapolis and St. Louis Railroad Company advises in view of such decision it refuses to make further payments to Peoria and Pekin Union Railway Company of charges named in tariff Eye See See number Thirty Six or any other tariff carrying charges on traffic interchanged at Peoria with tenant lines of Peoria and Pekin Union Railway Company stop This company construes decision of Commission to dismiss complaint of Minneapolis and St. Louis Railroad Company leaving tariff Eye See See number thirty six in full force and effect and stands ready and willing to accept all traffic offered in interchange on basis such tariff and has notified Minneapolis and St. Louis Railroad Company

> that unless settlements for handling of the traffic interchanged are made upon same basis heretofore existing it would be necessary to place that company upon cash basis requiring payment of tariff charges when cars are offered in interchange stop This for information of Commission concerning situation at Peoria stop. (R. 75, 80, 81.)

Commissioner Aitchison on January 5, 1923, replied by telegram as follows:

> Telegram to Secretary McGinty today. Order against Peoria and Pekin Union Railway still stands unrescinded with finding that its tariff on traffic interchanged with Minneapolis and St. Louis Railway is unduly prejudicial so long as Burlington and Rock Island are preferentially treated. Period. Commission is firmly of opinion that traffic through Peoria gateway must be kept moving in the public interest and desires assurances from you that there will be no interruption pending orderly disposition of any questions disputed between your company and common carriers connecting with you. Please answer. (R. 75, 80.)

In response to this telegram the president of appellant sent the following telegram, dated January 6, 1923:

> Your wire fifth controversy this company with Minneapolis and St. Louis assure you I am in hearty sympathy with Commission opinion that traffic should not be interrupted. However Minneapolis and St. Louis have notified me that they will refuse to pay charges on basis of existing tariff lawfully in effect

since Commission's order of December twenty second dismisses complaint of Minneapolis and St. Louis in docket one three one one naught in which discrimination was suggested cannot understand how there is now any existing discrimination order against Peoria and Pekin Union. Respectfully suggest that present status with Minneapolis and St. Louis which in practical effect has existed for nearly forty years should be continued pending general investigation. Mr. Fletcher legal counsel for this company in this matter will call on you Monday January eighth and explain our position more fully. (R. 82.)

On January 6, 1923, the Minneapolis & St. Louis Railroad Company filed a verified complaint with the Commission alleging, among other things, that a controversy existed between appellant and the Minneapolis & St. Louis Railroad Company as to the payment of the four-dollar intermediate switching charge provided for in appellant's tariff I. C. C. 36, above described; that the Commission's opinion and order in I. & S. 1596, which dismissed the complaint in No. 13110, "continues the unjust discrimination * * * found to exist in the original report in Docket 13110"; that this discrimination has not been removed by appellant; that the Minneapolis & St. Louis has been paying this charge up to January 2, 1923, on all cars in eastbound interchange; that the Minneapolis & St. Louis does not propose to make further payments, pending the Commission's general investigation; that appellant by telegram dated

January 4, 1923, indicated that unless such payments were made "it will refuse to accept traffic of this complainant and will again stop the flow of interstate commerce, thereby prejudicing the rights of this complainant and flagrantly violating the right of the public to have the avenues of commerce kept open and operated." In this complaint the Minneapolis & St. Louis asked the Commission "that you exercise the emergency and other powers with which the law has surrounded the Commission, and the same are invoked to the end that the respondent may be ordered, directed, and compelled to continue to handle the cars of this complainant in interchange at Peoria and moving under lawfully established rates provided in tariffs on file with the Commission * * *." (R. 52, 76.)

On January 8, 1923, the commission, in carrying out the intention expressed in its report of December 22, 1922, in I. & S. No. 1596, entered an order of investigation upon its own motion in No. 14534, into the complex situation existing in the Peoria-Pekin district. This order reads in part as follows:

> *It is ordered*, That the commission upon its own motion enter upon an investigation into and concerning the lawfulness of the rates, charges, regulations, and practices of the Peoria & Pekin Union Railway, and railroads with which it connects at and in the vicinity of Peoria, Ill., as applied to traffic to, from, and via Peoria, Ill., including the lawfulness of existing contracts between the Peoria & Pekin Union Railway Company and the so-

called tenants of that railroad, also the lawfulness of existing joint rates via Peoria, and the divisions thereof, on traffic moving in connection with the Peoria & Pekin Union Railway Company, and the nature and extent of the facilities furnished and services rendered by any of the respondents to other of the respondents at or near Peoria, whether in make-up or break-up yards, spotting, intermediate or terminal service, or otherwise, including facilities furnished or services rendered in respect of traffic moving on combination rates which break on Peoria, and the compensation therefor as between the respondents, with a view of determining just and reasonable individual and joint rates, charges, regulations, divisions, and practices, and requiring establishment thereof by order. (R. 11, 49, 77.)

Later in the day (January 8, 1923) an informal conference was held by Division 5 of the Commission at its office in Washington, at which counsel for appellant and counsel for the Minneapolis & St. Louis Railroad Company were present. The controversy between these companies was taken up at this conference, and an effort was made by the Commission to bring about an amicable settlement without interrupting the flow of traffic into and through Peoria. The Commission pointed out that it had already entered its order instituting a general investigation in No. 14534 with a view to effecting a reasonable adjustment of rates, divisions, and

charges as between the carriers, including appellant, at and in the vicinity of Peoria. (R. 76.)

On January 16, 1923, the president of the Peoria & Pekin Union Railway Company sent the following telegram to Commissioner Aitchison:

> Refer message sixth and Fletcher's conference with your division. Minneapolis and St. Louis Railroad still declines to make payments in accordance with tariff on file. I have to-day served notice on Minneapolis and St. Louis Railroad that unless payments are made as heretofore covering charges for intermediate switching performed by this company in accordance with tariff now on file with commission that on and after twelve noon Saturday, January twentieth, this company will accept only such cars for delivery to connections upon the payment of such charges in advance by the Minneapolis & St. Louis Company. This company stands ready to accept and handle all traffic promptly when offered in interchange or otherwise, but can not undertake to perform service without compensation. And in violation of tariff. This for your information. (R. 83.)

By reason of this notice of refusal of appellant to interchange the traffic under consideration between the Minneapolis & St. Louis Railroad Company and other carriers connecting with the Peoria & Pekin Union Railway Company at or near Peoria, whether such traffic moved under joint or combination rates, and by reason of the refusal of the Minneapolis & St. Louis Railroad Company to pay any charges

for the claimed services performed by the Peoria & Pekin Union Railway Company in interchange of such traffic, the Commission found that an emergency was thereby created which required immediate action by the Commission. Therefore, on January 18, 1923, the Commission, pursuant to the provisions of the interstate commerce act and more particularly paragraph (15) of section 1 of this act, entered Service Order No. 37, above quoted, requiring—

> That the Peoria & Pekin Union Railway Company shall, with reasonable promptness and diligence, continue to interchange freight traffic between the Minneapolis & St. Louis Railroad Company and connecting carriers at the regularly established interchange points at and in the vicinity of Peoria, Ill. (R. 14.)

PROCEEDINGS IN THE DISTRICT COURT.

On January 25, 1923, appellant filed its bill of complaint (R. 1) in the court below against the United States as defendant, and alleged, among other things, that "nowhere in the said act [interstate commerce act] or in any other act of Congress is the Interstate Commerce Commission given authority in emergency or otherwise to make an order of this kind. * * * The order is ultra vires and is consequently null and void" (R. 11); further, the order "directs plaintiff to perform an uncompensated service * * * for, * * * and furnish facilities to that company [the Minneapolis & St. Louis Railroad Company] without compensation, which has the effect of depriving plaintiff of its property without due process of law and

taking plaintiff's private property for public use without just compensation, contrary to the fifth amendment to the Constitution of the United States." (R. 12.) The prayer of the bill of complaint was that appellant "be granted a temporary injunction restraining the Interstate Commerce Commission and the United States from enforcing the terms of the said Service Order 37 and that upon final hearing of this cause a decree be entered adjudging the said service order to be in all respects null and void and ordering the same to be abrogated, cancelled, and set aside, and permanently enjoining the Interstate Commerce Commission and the United States of America from taking any steps to enforce the said order or from bringing any suits against the plaintiff for penalties." (R. 12.)

An answer to the bill of complaint was filed by the United States (R. 50) and, upon leave of court, answers were also filed by the Interstate Commerce Commission (R. 73) and the Minneapolis & St. Louis Railroad (R. 83). It was alleged, among other things, in the answers of the United States and of the Minneapolis & St. Louis Railroad that the order was made upon complaint of the Minneapolis & St. Louis Railroad and that the venue of the suit was, therefore, in the judicial district in which that railroad had its residence, namely the Southern District of Iowa, instead of the district in which the suit was brought (R. 51, 84).

In its answer the Commission, among other things, denied that Service Order 37 was beyond the

power of the Commission or that plaintiff was required by it to handle traffic without compensation (R. 75, 77).

Upon these pleadings and exhibits offered in evidence (Rec. 56, 81–83), the court below heard the case, denied the temporary injunction, and dismissed the bill. In a written opinion the court, after discussing the question of venue and deciding it in favor of appellant, proceeded to deal with the other questions in the case as follows:

> The dispute here involved between the Minneapolis & St. Louis Railroad, the P. & P. T. [Peoria Railway Terminal Co.], the Burlington, and the Rock Island, severally; on the one part and the plaintiff on the other, involves simply the moving and handling of cars over the tracks of the plaintiff between the carriers doing business through the Peoria gateway and involves the use of the terminals and facilities of the plaintiff, and we are of opinion that the Commission had the right to declare that an emergency existed and to promulgate the order in question.
>
> It is further urged, however, that the order is in violation of the fifth amendment because it directed the plaintiff to perform a service without any provision that it should get a compensation therefor, and that this was the taking of its property.
>
> We are of opinion that this, under all the circumstances of the case, can not be said to be true. While in the order itself the service is enjoined upon plaintiff without any compensation being there provided for, yet the

act above quoted under both "b" and "c" [Sec. 1(15) b, c] provides that the order may be entered on such terms as may be agreed upon or as the commission may, after subsequent hearing, find to be just and reasonable. But, in addition to this, though we do not deem it necessary to determine the situation of I. C. C. tariff No. 36, which was permitted to be filed and was afterwards found to be unjustly discriminatory against the Minneapolis & St. Louis, yet that tariff was not formally canceled, and it appears that the very purpose of the order was to hold in statu quo conditions at Peoria while the commission made the investigation set for February 20, 1923, the purpose of which was to determine what compensation if any, the plaintiff should receive not only from the Minneapolis & St. Louis but from the Burlington and the Rock Island, and possibly other questions. It is alleged and not disputed that the identical service commanded by the order has been performed for more than forty years by plaintiff for the Burlington and Rock Island without any compensation being asked, and that that is the identical service which the Minneapolis & St. Louis is asking shall be performed for it without compensation. Of course that could not be the basis for taking plaintiff's property without compensation, but it does present a very strong argument why the public should not be inconvenienced and suffer a discontinuance of that service while the Interstate Commerce Commission is investigating the question as to whether such a serv-

ice should be compensated for; and if so, what shall be the basis of the compensation.

We are of the opinion that the Interstate Commerce Commission acted within its powers and that the temporary injunction should be and is denied. (R. 101–102.)

QUESTIONS FOR DECISION.

The assignment of errors (R. 104), it is believed, raises the following two questions:

1. Was the Interstate Commerce Commission authorized by statute to issue Service Order No. 37?

2. Is this order in contravention of the fifth amendment to the Constitution?

ARGUMENT.

1. SERVICE ORDER NO. 37 WAS WITHIN THE AUTHORITY CONFERRED UPON THE COMMISSION BY THE INTERSTATE COMMERCE ACT, AND WAS ENTERED IN ACCORDANCE WITH THE DUTIES IMPOSED UPON THE COMMISSION BY THIS ACT.

The authority to make Service Order No. 37 is conferred upon the Commission by section 1 of the interstate commerce act and more particularly paragraph (15) of this section. This paragraph should be read in connection with paragraph (10) of section 1. These two paragraphs read as follows:

> (10) The term "car service" in this act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this act.

(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) To suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) *to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable;* (c) *to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable;* and

> (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded. (Italics ours.)

The provisions quoted should also be considered in connection with the provisions of paragraph (16) of section 1, which authorizes the Commission, in case a carrier is unable to transport the traffic offered it so as properly to serve the public, to "make such just and reasonable directions with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of roads as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people." Paragraph (4) of section 15, which authorizes the commission to prescribe through routes with certain limitations, contains a proviso that "in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may * * * establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

The provisions quoted evidence a clear intent by Congress to intrust the Commission with the affirmative administrative duty to keep the transportation system of the country intact; to prevent interruptions in the flow of traffic through the regular channels of commerce; to require the continued handling of through traffic by carriers over their lines in spite of quarrels between them as to the terms of handling the traffic; and to take such action with respect to the handling of cars and the movement of traffic as "to maintain an adequate railway service for the people of the United States."

In *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, this court in commenting upon the transportation act of February 28, 1920, which enlarged the emergency car service powers first given to the Commission by the amendment of May 29, 1917, to the act to regulate commerce, used the following language at page 585:

> It is manifest from this very condensed recital that the act made a new departure. * * * The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in section 15a to be one of the purposes of the bill.

In the *New England Divisions Case*, 261 U. S. 184, this court, at page 189, further commented upon the Transportation Act as follows:

> Transportation Act, 1920, introduced into the Federal legislation a new railroad policy. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585. Theretofore the effort of Congress had been directed mainly to the prevention of abuses; particularly those arising from excessive or discriminatory rates. The 1920 act sought to insure, also, adequate transportation service. That such was its purpose Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission new powers were conferred and new duties were imposed.

In footnotes to the language above quoted references were made, among other things, to the car-service provisions now under consideration.

The construction of the statute, claimed by appellant, that paragraph (15) of section 1 authorizes the commission merely to deal with cars, locomotives, and other vehicles, and not to direct the movement of traffic as in the present case, is not justified, it is submitted, by the language of the provisions quoted and would defeat the intent and purpose of the statute. The following language of this court in *Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452, 477, in dealing with the con-

tention that the Commission had no authority under section 15 of the act to regulate commerce to prescribe rules of car distribution because that section authorized the Commission to deal only with regulations or practices affecting rates, is apposite here:

> The contention gives to the words found in the earlier part of the section, "any regulation or practice whatsoever of such carrier or carriers affecting such rates," a dominant and controlling power so as to cause them to limit every other provision in the section, however general in its language. We do not stop to critically examine the provision relied upon for the purpose of pointing out, as a matter of grammatical construction, the error of the contention, because we think, when the text of the section is taken into view and all its provisions are given their natural significance, it obviously appears that the construction relied upon is without foundation, and that to sustain it would be to frustrate the very purpose which it is clear, when the entire provision is considered, it was designed to accomplish, and thus would be destructive of the plain intent of Congress in enacting the provision.

For other cases with respect to interpreting the act to regulate commerce so as reasonably to accomplish "the great public purpose which it was enacted to subserve," see *New Haven R. R.* v. *Interstate Com. Com.*, 200 U. S. 361, 391, and *Armour Packing Company* v. *United States*, 209 U. S. 56, 72.

See also *Johnson* v. *Southern Pacific Company*, 196 U. S. 1, 17.

What is or is not an "emergency requiring immediate action," and what steps should be taken to protect the public interest, are by the act made administrative questions for the Commission to determine. The importance of the original jurisdiction of the Commission has been emphasized in many cases decided by this court. In *Director General et al.* v. *Viscose Company*, 254 U. S. 498, this court in holding that the lower court was without jurisdiction, in the first instance, to prevent a carrier from changing its freight classification so as to exclude silk from commodities to be accepted for shipment, used the following language at page 504:

> The contention of the carriers, faintly made, that the common law and not the interstate commerce act furnished the measure of their obligation to the public was promptly overruled by the Commission, informed, as it was, by wide experience in traffic affairs and in the administration of the act.
>
> The importance to the commerce of the country of the exclusive, initial jurisdiction which Congress has committed to the Interstate Commerce Commission need not be repeated and can not be overstated (*Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304; *Minnesota Rate Cases*, 230 U. S. 352; *Texas & Pacific Ry. Co.* v. *American Tie Co.*, 234 U. S.

138, 146; *Pennsylvania R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456; 469, and *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, 49). * * *

The Commission's finding that there was an emergency and its order made to protect the public in this emergency can not be set aside unless some provision of the Constitution has been contravened or the Commission's action is arbitrary or transcends the legitimate bounds of its authority. The courts will not substitute their judgment for that of the Commission upon matters purely administrative and will not disturb the Commission's finding because the facts would have warranted a different conclusion or because the Commission's action is deemed inexpedient or unwise. *Interstate Comm. Comm.* v. *Illinois Central Railroad*, 215 U. S. 452, 470; *United States* v. *Louis. & Nash. R. R.*, 235 U. S. 314, 320; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481, 488; and *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57, 62.

The language of the Circuit Court of Appeals for the 4th Circuit in *Baltimore & O. R. R. Co.* v. *Lambert Run Coal Company*, 267 Fed. 776, is appropriate here, although this court later held (258 U. S. 377) that that court should not have taken jurisdiction or passed upon the merits of the case, because suit had not been originally instituted in the "three judge" court provided by statute. The language referred to was used concerning an emergency order (Service Order No. 8) of the Commission as to distributing coal cars, and is as follows (p. 780):

> The Commission having based their order on their opinion that an emergency such as was contemplated by the statute existed, it is not within the power of the court to annul their order on the ground that the administrative power conferred on the Commission was unwisely or improvidently exercised. *Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452, 478, 30 Sup. Ct. 155, 54 L. Ed. 280; *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553; 9 Ann. Cas. 1075.

In the present case if the Peoria & Pekin Union Railway Company had carried out its threat, one of the important arteries of the transportation system of this country would have been suddenly closed. The right of shippers to route traffic over the Minneapolis & St. Louis Railway Company through the Peoria gateway would have been denied, cars already in transit would have caused great congestion of traffic, and "the interest of the public and the commerce of the people" would have suffered. On such an occasion, and at a such a time, the Commission not only had a right to exercise its emergency powers but it was under an affirmative duty to do so to protect the public interest. This was true regardless of the private disputes between the carriers. See *United States* v. *Louisville & Nashville R. Co.*, 195 Fed. 88, 96, in which, prior to the legislation giving the commission emergency powers in respect to car service, the Commerce Court by mandamus required certain carriers to transport traffic over existing through routes

and under joint rates, regardless of their private disputes as to which should furnish cars for the transportation.

The Commission in the present case, as a last resort, exercised its emergency powers, after making every effort to bring about an adjustment of the controversy, at least, until the whole matter could be inquired into in the general investigation No. 14534, ordered by the Commission and set for hearing in Chicago on February 20, 1923.

2. THE SERVICE ORDER IS NOT UNCONSTITUTIONAL.

Paragraph (15) of section 1 of the act provides that the Commission may make "directions with respect to car service * * * upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable"; and provides that the Commission may authorize "the joint or common use of terminals" upon similar terms. Paragraph (16) of this section contains like provisions as to compensation. The statute thus makes full provision for a hearing and for compensation. The order, although silent as to compensation, must be read in connection with these provisions of the statute, and, when so considered, clearly does not violate the Constitution.

In the original proceeding, No. 13110, the Commission found the $4 intermediate charge published in appellant's tariff I. C. C. 36 to be unjustly dis-

criminatory against the Minneapolis & St. Louis Railroad, and in favor of the Burlington and Rock Island railroads, against which no similar charge was made. Later in I. & S. 1596 the Commission found that intermediate charges proposed by appellant on traffic interchanged with the Burlington and Rock Island were not justified, and that, because of the complexity of the entire subject matter of charges for services rendered at Peoria, a general investigation on the Commission's own motion should be instituted. This investigation was ordered in No. 14534. The Commission did not order the cancellation of the $4 charge published in tariff No. 36, but left the question of this charge open for determination in the general investigation. In this connection it is to be noted that, if the Peoria & Pekin Union Railway Company had imposed the $4 charge against the Minneapolis & St. Louis, this action would have been unjustly discriminatory under the decision in No. 13110. Furthermore, the tariff provided that this charge did not apply "to switching service for tenant companies under tenancy contracts," and one of the points in issue was whether or not the service fell within the tenancy contracts.

At this stage of the proceeding appellant, upon the refusal of the Minneapolis & St. Louis to pay the $4 charge, notified the commission that it would shut off all traffic interchanged with the Minneapolis & St. Louis at Peoria for delivery to connections. When it thus became apparent that appellant would

take this action, regardless of the provision made by the Commission to do justice to all parties in the general investigation, No. 14534, the Commission promptly exercised its emergency powers to protect the public interest.

In the light of this brief review of the facts, the commission's action, it is submitted, was clearly an appropriate means of carrying out the provisions of the statute and was not in violation of the Constitution.

In addition to what has been said, it is to be noted that the lower court pointed out (*supra*, page 2013):

> It is alleged and not disputed that the identical service commanded by the order has been performed for more than 40 years by plaintiff for the Burlington and Rock Island without any compensation being asked, and that that is the identical service which the Minneapolis & St. Louis is asking shall be performed for it without compensation. Of course, that could not be the basis for taking plaintiff's property without compensation, but it does present a very strong argument why the public should not be inconvenienced and suffer a discontinuance of that service while the Interstate Commerce Commission is investigating the question as to whether such a service should be compensated for; and if so, what shall be the basis of the compensation.

Appellant tries to make it appear that the Commission's service order required one carrier to perform a service for another carrier during an emergency. This is not the case. The Commission did

not order appellant to perform in an emergency a service which ordinarily was performed by the Minneapolis & St. Louis Railroad Company. At the time the order was issued, and prior to that time, appellant was performing an interchange service between the rails of the Minneapolis & St. Louis Railroad in Peoria and appellant's yard in East Peoria as a part of the through transportation of traffic over through routes and under through rates through Peoria. The Commission's order merely required appellant as a common carrier subject to the act to continue to perform for shippers this part of the through transportation service which appellant had theretofore customarily performed. The service was required not for the Minneapolis & St. Louis Railroad but for shippers, and was not a new service but one which appellant had previously performed. The question as to appellant's compensation, as between the carriers, for performing this part of the through transportation was left open for settlement by the carriers, if they could agree upon a settlement, and if not, they were left free under the express provisions of the act to ask the Commission to determine the question. The service order showed on its face that the Commission had already instituted a general investigation (No. 14534), in which an effort would be made to pass upon this and similar questions and to do justice as far as possible to all parties concerned.

The mere fact that the question as to compensation was left for later determination, in case the carriers

could not agree, can not be seriously questioned as being in violation of the fifth amendment to the Constitution. The constitutionality of such a procedure seems to be well established. *New England Divisions Case, supra,* at page 201 of the opinion. The emergency power which the Commission is authorized to exercise under section 1 with respect to car service is similar to the power which the Commission has under section 15 to suspend proposed increases in rates, pending a hearing and decision by the Commission as to the reasonableness of such rates. The constitutionality of these provisions has never been questioned. It is interesting to note also that the Commission's power to prescribe joint rates and through routes, leaving the question of compensation as between the carriers for later determination, has been upheld as constitutional. *St. Louis S. W. Ry. Co.* v. *United States,* 245 U. S. 136, at page 143.

It was the evident purpose of the statute to place upon the Commission, as a body experienced in traffic matters, the affirmative duty of maintaining an adequate transportation system in the interest of the public and of preventing congestion and interruptions in the flow of traffic through the regular channels of commerce. It was also evidently the intent of the statute that the Commission should have the power to act immediately in accomplishing the purposes of the statute, and that it should not have to wait perhaps for months to decide questions of compensation as between the carriers, with the

transportation facilities furnished shippers in the meantime seriously impaired. The wisdom of this policy is strikingly illustrated in the present case. The statute makes ample provision for a hearing and for compensation, and the Commission through its general order of investigation fully provided for an adjustment of the disputes of appellant and its connecting carriers and the compensation to be paid for services performed by appellant.

In view of all the circumstances it seems that the Commission exercised powers which it had under the act, and which Congress intended it to have, and that it exercised these powers wisely in protecting the interest of the public and the commerce of the people.

For the reasons above set forth the appeal in this case should be dismissed.

R. GRANVILLE CURRY,
For Interstate Commerce Commission,
Appellee.

P. J. FARRELL,
Of Counsel.

WASHINGTON, D. C., *November, 1923.*

○

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 318.

PEORIA AND PEKIN UNION RAILWAY COMPANY, *Plaintiff and Appellant,*

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND THE MINNEAPOLIS AND ST. LOUIS RAILROAD COMPANY, *Defendants and Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF FOR DEFENDANT AND APPELLEE, THE MINNEAPOLIS AND ST. LOUIS RAILROAD COMPANY.

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BRIEF AND ARGUMENT.

I. STATEMENT OF THE CASE.

The history of the controversy which culminated in the issuance by Division 5 of the Commission, of Service Order No. 37, is set forth in appellant's statement of the case with substantial accuracy, but does we believe require some amplification for the purpose of a proper consideration of the grounds upon which the claim of invalidity of the service order is based.

It appears from the allegations of the bill that each of the lines participating in the organization of the Peoria & Pekin Union Railway Company were at the time of its organization operating lines into the city of Peoria and each had, either through ownership or contract rights, terminal facilities therein. Each of them having the desire to extend their facilities within the cities of Peoria and Pekin, they organized the plaintiff company and the plaintiff company acquired, either by deed or lease, all terminal facilities which the organizing lines at that time were operating.

A so-called general contract, Exhibit "2" of plaintiff's bill, was then entered into, in which it was declared that the plaintiff company was organized to the end that the companies effecting its organization might extend their facilities within the cities of Peoria and Pekin, and which granted to the lessees the right to use as tenants in common all facilities of the plaintiff company within said cities. The term of the contract was for fifty (50) years. The capital stock as provided in the contract was to be taken, owned and held by the organizing lines and none of it was transferable by any one without the consent of each of the others, except for the purpose of qualifying directors. It is provided in the contract that each twenty-five (25) per cent of the capital stock was entitled to elect three (3) directors and that the right of cumulative voting should never be abridged without the unanimous consent of all stockholders; that the executive committee should consist of a representative of each interest of twenty-five (25) per cent of the stock; that the general manager could be appointed by the directors only with the acquiescence of the general manager of each of the stockholding lines; that any other employee could be discharged upon the request of any interest, and many

other provisions which related solely to the corporate management and the operation of the property by the plaintiff and not ordinarily present in contracts of lease.

In addition to the foregoing, it was provided that the plaintiff company would provide certain terminal facilities by way of roundhouses, freight houses, turntables, switch engines, and all classes of employees necessary for the operation of its terminal, and that the tenants should have the right to operate over the main lines with their own engines and crews between Pekin and Peoria and should have the right to the use of all tracks necessary to transfer cars to and from connecting railroads, but provided that the actual transfer of such cars must be made by party of the first part (the plaintiff).

Since the organization of the Union Company, the Cleveland, Chicago, Cincinnati & Pittsburgh Railway Company has succeeded to the rights of the Indiana, Bloomington & Western Railway Company, the Toledo, Peoria & Western Railway Company, Samuel M. Russell, receiver, has succeeded to the interest of the Wabash, St. Louis & Pacific Railway Company, the Chicago, Peoria & St. Louis Railway Company, Bluford Wilson and William Cotter, receivers, has succeeded to the rights of the Peoria & Jacksonville Railway Company, and the Illinois Central Railway Company has succeeded to the rights of the Peoria, Decatur & Evansville Railway Company. It also appears that the Lake Erie & Western Railroad Company and the Chicago & North Western Railroad Company have acquired a stock ownership in the plaintiff company and similar rights to use under similar contracts have been acquired; and in addition thereto contracts of tenancy have been entered into with the Pittsburgh, Chicago, Cincinnati & St. Louis Railway Company and the Chicago & Alton Railroad Company, W. G. Beard

and W. W. Wheelock, receivers, which are similar to the contracts entered into with the proprietary tenant, excepting only those provisions appropriate to an ownership of stock and management of the company.

None of these tenants, except the North Western, own or operate any terminal facilities within the city of Peoria, and the North Western owns but does not operate yards therein. Its yards are under lease and are operated by the plaintiff company and included within the facilities covered by its contract of tenancy.

Until April 1, 1921, this defendant and its predecessor in interest was also operating in Peoria under a similar contract of tenancy which was not renewed after its expiration on that date. It is alleged in the answer that during the years preceding 1921, the plaintiff failed to discharge its duty under the contract with this defendant in the furnishing of terminal service to such an extent that it was necessary for the purpose of properly discharging its duty in the transportation of freight, that the defendant construct terminals of its own and that after the expenditure of large sums of money on account of such failure on the part of the plaintiff, it had developed in the city of Peoria, yards, roundhouse, coal chute, water supply, and other facilities necessary for the operation of the terminal, and was at that time and has been since doing its own terminal service, operating its own switch engines in its own yards for the purpose of making up and breaking up its freight trains, and is doing for itself, with its own engines and crews, the work which it had formerly employed the plaintiff to do under the provisions of its tenancy contract.

About two (2) months after the expiration of the tenancy contract between the plaintiff and this defendant, plaintiff asserted the right to impose a charge against

this defendant for cars interchanged between this defendant and the plaintiff's tenants. The asserted right was denied by this defendant upon the ground that the delivery of a car to the plaintiff for the purpose of transportation on or beyond the line of a tenant was a delivery to the tenant which had the right to use for that purpose the facilities of the plaintiff, and that the delivery by the plaintiff of a car from the tenant to this defendant was a delivery by the tenant; and in neither case was any service performed for this defendant.

This controversy was brought to a crisis on August 15, 1921, when the plaintiff refused to deliver cars to this defendant which were received from tenants, and refused to accept from this defendant cars tendered by it to the tenants. The congestion resulting from this refusal was relieved by the securing of a temporary restraining order from the Judge of the United States District Court in and for the Southern District of Illinois, and prior to the time of the hearing of this defendant's application for temporary injunction (plaintiff there) a tariff was filed by plaintiff herein under special permission to make the same effective upon one day's notice, which by its terms provided for the assessment of a charge against The Minneapolis & St. Louis Railroad Company for each car moved to or from its connection from or to the East Peoria yard. A motion to dismiss the bill in that proceeding for want of jurisdiction was based upon the existence of this tariff and was sustained. Thereupon this defendant filed with the interstate Commerce Commission its complaint, which was docketed as No. 13110, attacking the validity of the tariff upon the ground that the service for which the charge was sought to be imposed against The Minneapolis & St. Louis Railroad Company was service rendered not for its benefit

but for the benefit of the tenant and was therefore invalid, and also upon the ground that it subjected The Minneapolis & St. Louis Railroad Company to an unlawful discrimination for the reason that no similar charge was sought to be imposed against the Rock Island and the Burlington companies, neither of which were tenants and each of which interchanged cars with the tenants of the plaintiff herein over the facilities of the Union Company.

The opinion of the Commission in that proceeding is attached to plaintiff's bill as Exhibit "3" (Record, page 33), in which the Commission declined to hold that the Peoria & Pekin Union Railway Company had no right to assess any charge against The Minneapolis & St. Louis Railroad Company but did find the tariff unlawfully discriminatory, and an order (Record, page 39) was entered requiring the plaintiff on or before July 13, 1922, to remove the unjust discrimination and undue prejudice found to exist in its report.

Thereafter the Union Company filed its tariff I. C. C. No. 40, which by its terms provided the assessment of a charge against the Rock Island and Burlington companies upon cars interchanged between them, respectively, and the tenant lines. This tariff was suspended pending the hearing, after which the report of the Commission was filed, Exhibit "4" of plaintiff's bill (Record, page 40), holding that the Union Company had failed to justify these charges and they were ordered finally cancelled. In this report the Commission expressly declined to make a finding in 13110, which had been re-opened and consolidated with the hearing on the suspension of tariff I. C. C. No. 40, and entered a formal order dismissing the complaint without prejudice to a re-canvass of the situation, and later entered an order on its own motion for a general investigation.

No change was made in the order of April 13, 1922, to remove the discrimination, but it was decided that it was not open to the plaintiff to remove it by imposing a similar charge against the other lines.

It is the contention of this defendant that the order to remove the discrimination was still in effect and should be complied with, while it is the contention of the plaintiff that the tariff was still in effect and entitled it to collect from this defendant the charges provided for therein.

Upon the threat of the Union Company to interrupt the service, petition was filed by this defendant, calling to the attention of the Commission the threatened interruption, as a result of which, Service Order No. 37 was issued.

Upon the allegations of the bill and exhibits attached thereto, the answers of the United States, the Interstate Commerce Commission and The Minneapolis & St. Louis Railroad Company, and the exhibits attached thereto, respectively, the court declined to issue a temporary injunction as prayed.

II. ARGUMENT.

A. Effect of the Service Order.

The grounds alleged and argued, upon which the claimed invalidity of the order in question is based, as we read the bill, are, first, that the order of the Commission is beyond the authority granted to it for the reason that "plaintiff is required without compensation to handle traffic between The Minneapolis & St. Louis Railroad Company and connecting carriers at Peoria in violation of the terms of said tariff I. C. C. No. 36, which tariff is still in effect and in violation of the constitutional rights

of the plaintiff to demand and receive compensation for facilities furnished and services rendered *to The Minneapolis & St. Louis Railroad Company.*" (Paragraph 14 of the bill, Record, page 11); and, second, that the order "infringes upon the constitutional rights of the plaintiff in that it directs plaintiff to perform an uncompensated service and to continue to perform work *for the Minneapolis & St. Louis Railroad Company,* and to furnish facilities *to that company,* without compensation, which has the effect of depriving plaintiff of its property without due process of law and taking private property for public use without just compensation, contrary to the Fifth Amendment to the Constitution of the United States." (Paragraph 18 of the bill, Record, page 12.)

Under the first of the above allegations the argument is pressed that the order is beyond the powers of the Commission because it requires the plaintiff to do switching for another company, to wit, this defendant; on the second it is urged that its constitutional right to compensation is infringed because the service rendered and facilities furnished in compliance with the order under attack is rendered to this defendant.

Therefore, unless the record upon which the hearing in the court below was had discloses that as a result of the issuance of the service order the switching which is necessary to be done to comply with it is done FOR THIS COMPANY, and the facilities which it is necessary to furnish are furnished TO THIS COMPANY, the order of the court below must be affirmed. On the contrary, if such service as is performed or such facilities as are furnished are not to this defendant but to the tenants which are bound by their contracts to pay therefor, no case of taking property without compensation is presented.

It is our contention that under the record as made

the plaintiff is compensated under its contract with the tenants for all service performed or facilities furnished for the interchange of traffic between the tenants and this defendant. That the order requires the performance of no service for The Minneapolis & St. Louis Railroad Company and that therefore the plaintiff has no right to compensation by The Minneapolis & St. Louis Railroad Company of which it has been deprived. The plaintiff in receiving cars from The Minneapolis & St. Louis Railroad Company for interchange to its tenants, and in delivering cars from the tenants to The Minneapolis & St. Louis Railroad Company, is acting merely as the agent of the tenants, and is discharging its duty to them under its contract to furnish facilities for the receipt and delivery of cars from and to connecting railroads. An analysis of the contract under which the plaintiff furnishes terminal facilities and services to its tenants shows that the facilities used in interchange are used by the tenant and the services rendered are rendered for the tenant. Therefore the order requires of the plaintiff no more than is required by the tenancy contracts, for the compensation by them provided.

The preamble of the contract, after designating the parties, plaintiff as the first party and the four organizing lines as the second, third, fourth and fifth parties, respectively, recites:

> "That whereas the four last named railway companies for the more convenient and economical transaction of their business and the better accommodation of the public desire to extend and improve their facilities in the city of Peoria in the state of Illinois and to that end have caused to be organized and incorporated under the laws of the state of Illinois the said Peoria & Pekin Union Railway Company, party of the first part hereto, the capital stock

of which is to be taken, held and owned by the said four constituent companies, as hereinafter mentioned."

The declared purpose of the contract, then, was to extend and improve the facilities within Peoria then owned by the organizing lines. And then follows a description of the facilities which the plaintiff acquired for the purposes of its organization and uses, and then a general grant of the right to use, in the following language:

> "That the said party of the first part hath let, leased and demised and by these presents doth let, lease and demise unto said parties of the second, third, fourth and fifth parts, respectively, their successors and assigns, all and singular its main tracks, sidetracks, switches, turnouts, connecting tracks, roundhouses, freight houses, passenger depots and all its terminal facilities in said cities of Peoria and Pekin, whether the said described premises are now owned or held by said first party or shall be hereafter acquired."

It is then provided that the premises could be used in a certain manner. First, the right to use in common the main track for running in trains with their own engine and employees between Pekin and Peoria.

Following this the use of certain facilities not here material is provided, and then:

> Fourth, (Record, page 19). "The said lessees shall severally have the right to the use of all the transfer tracks, sidetracks, switches and turnouts and other terminal facilities of the first party at the said cities of Peoria and Pekin for the transfer of loaded and empty freight and other cars by the said first party from and to all freight houses, warehouses, packing houses, stockyards, grain elevators, distilleries, mills and other industries, *and to and from the*

tracks and warehouses of other railroads, with any of which the tracks of the first party shall at any time be connected, whether such tracks or any of them shall be owned or held or in some otherwise controlled by said first party; and the said first party for the considerations aforesaid, doth hereby covenant and agree promptly and efficiently and without discrimination or partiality in favor of any company or the business thereof, to make such transfers of the loaded and empty freight and other cars of said lessees, respectively, etc."

It is also provided in the contract (Record, page 23):

"The said lessees shall also severally pay at the time and in the manner aforesaid, or within ten (10) days after a statement thereof shall be furnished by the party of the first part, all such reasonable charges as shall be made by the party of the first part for the preceding calendar month for the transfer service herein *required* to be done *to and from connecting railroads,* being a uniform rate per car which shall have been previously fixed by said party of the first part, to be charged to all companies for such services, without discrimination, and which shall approximate the actual cost of such service as nearly as practicable, which shall include the charges for making up trains."

It is further provided (Record, page 24):

"And that all of the loaded and empty freight cars of said lessees respectively, coming into and going out of the said city of Peoria, whether the same be for transfer to or from the said main tracks and to or from other railroads or consigned to or from any of the industries in the city of Peoria aforementioned, *shall be delivered to said party of the first part* to be transferred, switched or handled *by it for such lessee* and that all of the freight or passenger trains of such lessees, respectively, moving to or from Peoria shall pass over the track of said first party."

Upon the foregoing provisions this defendant bases its contention that the facilities used and services rendered in transferring a car from a nontenant connection to a tenant or vice versa, are rendered for or furnished to the tenant and not the nontenant, and that such a transfer constitutes a use by the tenant in the manner provided, which excludes the possibility of the same facilities being at the same time used by the nontenant from or to which the car may be transferred.

All the facilities of the plaintiff company are leased to the tenants. The main line may be used for the purpose of running a train between Pekin and Peoria with the engines and crews of the tenant. The side tracks, turnouts and switches may be used for the purpose of a transfer of a car from tenant to a line connecting with the plaintiff's rails, or in the reverse direction with the engines and crews of the plaintiff. The right to the use of the main line for the purpose of running a train and to the use of such facilities as are necessary to effect a transfer of a car to a connecting line, differ only in the respect that in the case of the main line the engines and crews of the tenant may be used, while in the case of the transfer of a car to a connection the engines and crews of the plaintiff must be used. In either case it is a use by the tenant. The requirement that the transfer must be made by the first party is a mere qualification upon the manner in which the right may be enjoyed, but is none the less a use by the tenant and not that of the connection to or from which the car may be transferred.

Each time the engine of the Union Company makes a transfer of a tenant's car from or to a connecting railroad, it constitutes a use by the tenant of the facilities of the plaintiff which are necessary to make such transfer. This being true, the plaintiff is not required by

Service Order No. 37 to allow *this defendant* to use its facilities without compensation or to perform switching service *for this defendant.* It has required that all cars coming into and going out of Peoria "whether the same be for transfer to or from said main track, or to or from other railroads," be delivered to it and it has agreed that they will be transferred by it "for such lessee." In other words, it has provided by its contract that it will accept on behalf of its tenants all cars arriving over the lines of other railroads, which are to move out of Peoria over the line of any tenant. The tenants have obligated themselves to receive cars in no other way than through the facilities of the Union Company, and when received either from the tenant for transfer to other railroads or from other railroads for transfer to tenants, the Union Company has ageed that it will make the transfer for said lessee. By the terms of the contract then, the transfer of a car to or from a connecting railroad is defined to be a use by the tenant. It has granted the right to use the transfer tracks for such purpose to the tenants. That use may be enjoyed by the employment of the Union Company's engines and crews but it is none the less a tenant's use, for which the tenant agrees to pay.

The facilities of the Union Company are the only facilities upon which the tenants may receive or through which they may deliver cars from or to lines connecting with the Union Company. They cannot interchange cars between themselves except through the agency of the facilities and services of the Union Company. Cars for tenants are delivered to the Union Company because it is their receiving agency.

Therefore, when The Minneapolis & St. Louis Railroad Company delivers a car to the Union Company which in the course of transportation is to move out of Peoria

over the line of a tenant, the delivery to the tenant is complete and the movement from there on, whether made by the Union Company or the tenant is made only for the purpose of discharging the duty which the tenant owes to carry on the transportation; and if it sees fit to employ the engines and crews of the Union Company for the purpose of switching a car into a train instead of employing its own, or sees fit to acquire operating rights over the facilities of the Union Company instead of acquiring tracks and yards of its own, the obligation to compensate the Union Company is that of the tenant and not that of the connection from which the car was received.

It has been contended before the Commission that this clause of the contract granting to the tenant the right to have transfer service performed gave to the tenant only the right to make a demand for the performance of said service, and involved no obligation on its part to require the Union Company to perform it. It required, however, no contract between the tenant and the Union Company to impose upon the Union Company the duty to make a transfer of a car upon demand. That is one of its common carrier duties. If the Union Company were unquestionably an independent intermediate carrier it would be under obligation upon the tender of a car to it for transfer, to make the transfer. But under its common law duty as a carrier the Union Company would not be bound to receive trains and break them up and furnish freight houses and team tracks nor would it as a carrier have any right to compel a carrier to make delivery of cars to it for transfer by it to or from a connecting line. The contract was intended to extend the facilities of each of the tenants so that each might receive cars at any point where the facilities of

the Union Company made it possible to do so, and after being received upon such facilities, have the same transferrred and placed in train for movement beyond Peoria.

For any car transferred from a tenant to any railroad whose tracks the Union Company connects the tenant pays the plaintiff, and for any car received from the Union Company's connection and delivered to a tenant, the tenant likewise pays. It pays because the contract has defined such a transfer to be a use by the tenant. That is the use for which it agreed to pay. This obligation of the tenant commences and ends with the use. The commencement or termination of the use by the tenant is the termination or commencement of the duty of the nontenant.

In *Chicago & Alton Railroad Co. vs. Peoria & Pekin Union Railway Co.*, 250 Ill. 320, 95 N. E. 137, the contract was given the construction for which we here contend. The contention that the Union Company was the agent of its tenant was made by the Union Company itself. The case involved the right of the Alton to recover from the Union Company an amount of money that it had been required to pay on account of pilferage of goods from a car which had been transferred by the Union Company from an Alton train to a team track for unloading. After it had been set at the unloading point by the Union Company and the liability had become that of a warehouseman, the car was broken into and robbed and the Alton held liable to the consignee for the loss. After payment, the Alton undertook to recover over from the Union Company. The Union Company contended that it was not liable to the Alton for the reason that in moving the car from the Alton's train to the team track it was acting merely as the agent of the Alton and that after it had placed the car upon the track its duty with

respect thereto terminated while that of the Alton continued. The case was decided by the court in accord with this contention. The court used the following language:

> "In the contract between the parties, the appellee is referred to as a lessee. In fact it is a lessee. It has a right to the possession and use of the tracks and property mentioned in the contract as complete though not so extensive as that of appellant who owns them. This right is not exclusive but is shared by the appellant and the other railroad companies to whom similar leases have been made. Whenever any part of appellant's track is occupied by the appellee's cars placed there under the contract for delivery to the consignee, the occupancy is the appellee's occupancy. It is for the time being exclusive and as rightful and complete as if the appellee were the sole owner of the track. Whenever the appellee wants a car placed on one of appellant's tracks which the appellee has the right to use, and the car is accordingly so placed, *the appellee's possession and control of the car are as complete and its rights and obligations in respect thereto are the same as if the car stood upon any part of the appellee's own track except that appellee cannot use its own motive power to change the location of the car but must call upon the appellant for that purpose.*" (Italics ours.)

This is precisely the claim made by this defendant and is the ground upon which it based its refusal to pay to the Union Company any sum on account of cars delivered to it for transportation by its tenants or received from it in interchange from the tenants. When cars designed for transportation over the line of a tenant are placed by this defendant upon the Union Company's tracks, it is delivery to the tenant and the occupation of the track by the car is the occupancy of the tenant. The cars being placed upon the Union Company's tracks for

transfer, upon a track which the tenants have a right to use, the language above quoted, "that the appellee's possession and control of the car are as complete and its rights and obligations in respect thereto are the same as if the car stood upon any part of appellee's own track" is applicable to the situation. It is, then, the duty of the tenant to move the car to any place which it may find convenient but having agreed not to use the tracks for the purpose of transfer of cars except by the use of the motive power of the Union Company, is compelled to employ that company to do such work and necessarily incurs the obligation to compensate the Union Company for doing it.

It is further said in the opinion:

> "In switching and transferring cars in accordance with appellee's direction, whether from the appellee's terminal in Peoria to the track of appellant convenient for delivery to the consignee, or from one of the tracks or divisions of appellee's railroad to another of such tracks or divisions *or to another railroad or from one of the appellant's tracks to another, the appellant's duty and liability are the same. In all of this switching service of whatever character it acts merely as the agent of the appellee* to shift the latter's cars from one track which the appellee has a right to use to another track which it has a right to use for the purpose of enabling the appellee conveniently to complete its contract of carriage and make delivery to the consignee." (Italics ours.)

It seems therefore that in performance of such service as is necessary in effecting interchange of cars between The Minneapolis & St. Louis Railroad Company and the tenants of the plaintiff over the tracks which the tenants have the right to use, the plaintiff acts merely as the agent of the tenant.

Therefore, whenever a car touches a track of the Union Company it is upon a track which the tenant has the right to use. Its movement from that point to any other point within the terminal if made by the plaintiff is made by it as the agent of the tenant, in order to enable the tenant to discharge its duty of carriage, and being made for such purpose, it is manifestly improper to assess a charge therefor against the connection who places the car upon the Union Company's facilities for the purpose of delivering it to the tenant.

The following language is also pertinent:

> "Since it (the Alton) had no facilities for delivering freight at its own terminal, it obtained from the appellant a lease on other premises and since it could reach such premises only over the appellant's track, it employed the appellant to switch its cars to such premises."

The same reasoning is applicable to the transfer of cars from one railroad to another. Since the tenants have no facilities of their own in Peoria for the receipt or delivery of cars from or to connecting railroads, it has employed the Union Company to switch cars for that purpose over premises which it obtained from the plaintiff by a lease.

It is proper to consider in connection with these tenancy contracts the definition of the term "railroad" as set forth in Paragraph 3 of Section 1 of the Act to Regulate Commerce. It provides:

> "The term railroad as used in this act shall include all bridges, car floats, lighters and ferries used by or operated in connection with any railroad and also all the road in use by any common carrier operating a railroad, whether owned or operated un-

der a contract, agreement or lease, and also all switches, spurs, tracks, terminals and terminal facilities of every kind used or necessary in the transportation of persons or property designated herein, including all freight depots, yards and grounds used or necessary in the transportation or delivery of any such freight."

Here it is seen that the terminal facilities of the Union Company are used by the tenants and necessary for the purpose of receipt or delivery of freight, and are in fact operated under contract of lease by virtue of the provisions of the contracts which grant to the tenants the right to use the facilities for the purpose of interchange of cars. By reason of the necessity that such facilities be used to enable the tenants to complete the discharge of their common carrier duties, the facilities of the Union Company are plainly a part of the "railroad" of each of the tenants operating into Peoria. There is, therefore, a direct connection between the rails of this plaintiff and the facilities of each of the tenants. In such case it is the duty of each line to operate up to the point of connection. That is the place where the duty of each begins and ends.

The situation is not dissimilar to that presented by the record in the case *C. M. & St. P. Ry., et al. vs. Minneapolis Civic Association*, 247 U. S., 490. In that case certain terminal facilities were owned by the Minneapolis Eastern Company, the stock of which was owned in equal parts by the Milwaukee and Omaha companies. There were also contracts between the Eastern Company and each of its stock holding lines, granting to them the right to use the facilities in a way similar to the provisions of the contract in the case at bar. The contracts likewise contained provisions relating to the control of the company and this court affirmed the decree of the Supreme

Court of Minnesota in holding that the facilities of the Eastern Company were in fact merely the facilities of the stock holding lines. In the opinion this language is used:

> "While the statements of the law thus relied upon are satisfactory in the connection in which they are used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to not for the purpose of participating in the affairs of a corporation in the normal and usual manner but for the purpose as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies. *U. S. vs. Leigh Valley R. R. Co.*, 220 U. S., 257, 273. *U. S. vs. Delaware, Lackawanna & Western*, 238 U. S. 516. In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law but regardless of fictions will deal with the substance of the transactions involved as if the corporate agency did not exist and as the justice of the case may require."
>
> "Satisfied as we are by the evidence that the Eastern Company is a completely controlled agency of the two companies which own its capital stock, we agree with the Supreme Court of Minnesota that the fact that the legal title to what are obviously terminal or spur delivery tracks is in the Eastern Company should not be permitted to become the warrant for permitting a charge upon shippers greater than they would be required to pay if that title were in the owning company. The order of the Commission affirmed by the Supreme Court of Minnesota, so far from being arbitrary is plainly just and clearly it does not deprive the plaintiffs in error of their property without compensation or without due process of law by requiring as it does that for rate making purposes the Milwaukee and the Omaha companies shall extend to shippers over their tracks the legal title to which is in the Eastern Company, equality of treatment with that which they give to shippers over their separately owned tracks for similar services rendered."

We have in the statement of the case called attention to many provisions in the contract relating to corporate control which are similar to the provisions existing in the contracts between the Omaha, Milwaukee and Eastern companies, which when considered in connection with the fact that the Union Company was organized for the purpose of consolidating the terminal facilities which at the time of its organization were owned by the organizing lines, the broad grants contained in the leases themselves, the fact that they were renewable upon like terms forever, the principle in the Eastern case becomes controlling here. To paraphrase a part of the preceding quotation, the fact that the legal title to what are obviously terminal or spur delivery tracks is in the Union Company should not be permitted to become the warrant for permitting a charge upon connecting carriers greater than they would be required to pay if that title were in the owning companies.

It is obvious that if the title to the tracks of the Union Company which connect with the tracks of this company were in the tenants instead of the Union Company no charge could be assessed against this defendant for the delivery of cars upon those tracks in interchange with the tenants.

It is also pertinent to consider the following language from that opinion in connection with the declared purpose of the contract, the situation that existed prior to the organization of the Union Company and the character of the contracts executed:

> "This discussion of the evidence in this case renders it very clear that the purpose of the Milwaukee and Omaha companies from the beginning was to construct and operate but one track to the group of industries to be served instead of each building and

maintaining its own track and to construct and use that track in common so that each might have the benefit of it as fully as if it were the sole owner. To accomplish this end they resorted to the familiar device of incorporating the Eastern Company and in order that their purpose might not be defeated in the future by the design or business necessity of either company, the contract between them which we have discussed was entered into to prevent the corporate organization of the Eastern Company and the control of its operations from being changed by either without the consent of the other, and the evidence makes it very clear that all through its corporate life the Eastern organization has been consistently used as a mere agency of the two owning companies to accomplish their original purpose."

So in the case at bar it is very clear that the purpose of the organizing companies was to construct and operate but one set of facilities instead of each building and maintaining its own, and to use those facilities in common so that each might have the benefit of them as fully as if each were the sole owner. To accomplish this end they resorted to the familiar device of incorporating the Union Company, and in order that their purpose might not be defeated in the future the contract between them was entered into to prevent the corporate organization of the Union Company and the control of its operation from being changed by any of them without the consent of each of the others.

B. The Claim That the Order Violates the Tariff.

It is the claim of the appellant that the order requires it to switch cars for this defendant in violation of the terms of its tariff.

The tariff provides for the assessment of a charge per car between the track connection of The Minneapolis & St. Louis Railroad Company and the Peoria & Pekin

Union Railway tracks in East Peoria yard, and carries the notation "Will not apply to switching service for tenant companies under tenancy contracts."

It therefore means that if a car is moved between the Union Company's tracks in East Peoria yard and the track connection of The Minneapolis & St. Louis Railroad Company for a tenant company under a tenancy contract, the charges provided for do not apply. The movement of a car between the two points mentioned is, as we have attempted to demonstrate, a switching service for a tenant company under a tenancy contract and therefore within the exception provided for in the note.

Moreover, if the record discloses a situation which makes it unlawful for the Union Company to impose a charge against this defendant, the tariff is itself unlawful and need not be observed. See *Boston & Maine vs. Piper*, 246 U. S. 439.

III. CONCLUSION.

We therefore respectfully submit that under the allegations of the bill and answers of the respective parties, when considered in connection with the exhibits attached thereto, the service order, the contract, the reports of the Commission attached to the bill, it is clear that the order requires nothing more of the plaintiff than that it continue to act as agent of each of its tenants in delivering to and receiving from connections, cars interchanged with the tenants; that in permitting such interchange to be made its facilities are not used by this defendant nor is any service performed for it, but on the contrary such use of facilities is enjoyed by and such services as are necessary are rendered to the tenants for which under the terms of the contract compensation to the Union Company is provided.

Therefore, it is unnecessary to determine whether or not the order requires switching or the performance of services for another carrier or whether or not it is within the power of the Commission to order such services to be performed. Whether, as an abstract proposition, the order under its terms goes beyond the powers conferred by Congress is immaterial, for the reason that under the situation as presented by the record in this case the plaintiff has failed to show that as a result of the issuance of the said order its property is being taken for public use without compensation or that it is deprived of its property without due process of law. The claims of constitutional infringement of plaintiff's right are based entirely upon the assumption that the services required to be performed and the facilities furnished are performed *for* and *furnished to The Minneapolis & St. Louis Railroad Company.* That this is an erroneous assumption is clear. The facilities are furnished to the tenants under the terms of the tenancy contracts. The services performed thereon or therewith are performed for the tenants under the same agreements. By virtue of those contracts the facilities have become part of the railroads of the tenants and neither they nor their agent has any right to collect from a connection a charge for receiving or delivering a car in interchange. The plaintiff has no right to be compensated by this defendant and this being the only right of which it claims it is deprived by the issuance of the service order, it follows that the order of the District Court must be affirmed.

Respectfully submitted,

M. M. JOYCE,

DONALD EVANS,

Attorneys for Appellee, The Minneapolis & St. Louis Railroad Company.

PEORIA & PEKIN UNION RAILWAY COMPANY *v.* UNITED STATES, INTERSTATE COMMERCE COMMISSION, AND MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

No. 318. Argued November 20, 21, 1923.—Decided January 7, 1924.

1. The authority conferred upon the Interstate Commerce Commission by the Transportation Act, 1920, to issue orders without notice or hearing, in certain classes of cases, if it finds that an emergency exists, does not sustain an order, so issued, requiring a terminal carrier to switch, by its own engines and over its own tracks, freight cars tendered by or for another connecting carrier. P. 532.
2. The provision of the Act of October 22, 1913, that suit to set aside an order of the Commission shall be brought in the district of the residence of the party on whose petition the order was made, relates to venue, not to jurisdiction of the subject matter; and objection that the suit is in another district, will be waived if not made in the trial court. P. 535.
3. In a suit of that kind, wherein the District Court overruled an objection by the United States to the venue, but refused a temporary injunction, and the plaintiff appealed, *held* that the right of the United States to insist upon its objection was lost by its failure to take a cross appeal. *Id.*

Reversed.

APPEAL from a decree of the District Court refusing a temporary injunction in an action to set aside an order of the Interstate Commerce Commission.

Mr. Robert V. Fletcher, with whom *Mr. John M. Elliott* was on the brief, for appellant.

Mr. Blackburn Esterline, Assistant to the Solicitor General, for the United States.

The emergency order was entered on the petition of Minneapolis & St. Louis Railroad, a resident of Iowa, and the District Court was without jurisdiction. Urgent De-

ficiencies Act 1913, 38 Stat. 209, 219; Commerce Court Act, 36 Stat. 539, 542; *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Oregon* v. *Hitchcock*, 202 U. S. 60; *United States* v. *Lee*, 106 U. S. 196; *Kansas* v. *United States*, 204 U. S. 331; *Illinois Central R. R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557; *Procter & Gamble Co.* v. *United States*, 225 U. S. 282; Interstate Commerce Act, § 5, 34 Stat. 584, 592.

The order was within the power of the Commission. Transportation Act, §§ 400, 402, 41 Stat. 456, 474, 476; *Pennsylvania Co.* v. *United States*, 236 U. S. 351.

Mr. R. Granville Curry, with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission.

The order was within the authority conferred upon the Commission by the Interstate Commerce Act, and was entered in accordance with the duties imposed upon the Commission by this act. *Wisconsin R. R. Comm.* v. *Chicago, B. & Q. R. R. Co.*, 257 U. S. 563, 585; *New England Divisions Case*, 261 U. S. 184, 189; *Interstate Commerce Comm.* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 470, 477; *New Haven R. R. Co.* v. *Interstate Commerce Comm.*, 200 U. S. 361, 391; *Armour Co.* v. *United States*, 209 U. S. 56, 72. See also *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 17; *Director General* v. *Viscose Co.*, 254 U. S. 498, 504; *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481, 488; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57, 62; *Baltimore & Ohio R. R. Co.* v. *Lambert Run Coal Co.*, 267 Fed. 776; s. c. 258 U. S. 377; *United States* v. *Louisville & Nashville R. R. Co.*, 195 Fed. 88, 96.

The order is not unconstitutional. *New England Divisions Case*, 261 U. S. 201; *St. Louis S. W. Ry. Co.* v. *United States*, 245 U. S. 136, 143.

Mr. Donald Evans, with whom *Mr. M. M. Joyce* was on the brief, for Minneapolis & St. Louis Railroad Company, appellee.

Whether, as an abstract proposition, the order in its terms goes beyond the powers conferred by Congress is immaterial, for the reason that, under the situation as presented by the record, the plaintiff has failed to show that, as a result of the issuance of the order, its property is being taken for public use without compensation, or that it is deprived of its property without due process of law. The claims of constitutional infringement of plaintiff's rights are based entirely upon the assumption that the services required to be performed and the facilities furnished are performed for and furnished to the Minneapolis & St. Louis Railroad Company. This is an erroneous assumption. The facilities are furnished to the tenants of the plaintiff under tenancy contracts. The services are performed for the tenants under the same agreements. By virtue of those contracts, the facilities have become part of the railroads of the tenants, and neither they nor their agent has any right to collect from a connection a charge for receiving or delivering a car in interchange. The plaintiff has no right to be compensated by this defendant, and, this being the only right of which it claims it is deprived by the issuance of the service order, it follows that the order of the District Court must be affirmed.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Transportation Act 1920 confers upon the Interstate Commerce Commission authority to issue, in certain classes of cases, orders "with or without notice, hearing, or the making or filing of a report," if it finds that an emergency exists. Act of February 28, 1920, c. 91, § 402, 41 Stat. 456, 476–477, 486.

Purporting to act under this power, the Commission ordered, without notice or hearing, that the Peoria &

Pekin Union Railway Company "continue to interchange freight traffic between the Minneapolis & St. Louis Railroad Company and connecting carriers at the regularly established interchange points at and in the vicinity of Peoria, Ill." This order required the terminal company to switch, by its own engines and over its own tracks, freight cars tendered to it by, or for, the Minneapolis & St. Louis, a service which it had threatened to discontinue because the payment demanded therefor had been refused.[1] The Peoria Company insisted that the Commission was without authority under its emergency power to require one carrier to switch cars for another; and brought this suit against the United States in the federal court for southern Illinois to enjoin the enforcement of the order. The Commission and the Minneapolis & St. Louis intervened as defendants. The case was heard upon application for a temporary injunction; the injunction was denied; and the Peoria Company took a direct appeal to this Court under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220.

It is conceded that the Commission could, under its general powers and upon appropriate procedure, order a terminal company to perform a service of this character. But under the general powers of the Commission this could be done only after full hearing, and such an order would ordinarily not take effect under the law until thirty days after service.[2] It is also conceded that the existing

[1] See *Minneapolis & St. Louis R. R. Co.* v. *Peoria & Pekin Union Ry. Co.*, 68 I. C. C. 412; *Intermediate Switching Charges at Peoria, Ill.*, 77 I. C. C. 43.

[2] See *Pennsylvania Co.* v. *United States*, 236 U. S. 351; *Louisville & Nashville R. R. Co.* v. *United States*, 238 U. S. 1, 20; Act to Regulate Commerce, § 3, par. 3, 41 Stat. 456, 479; and see § 15 as amended, 34 Stat. 584, 589; 41 Stat. 456, 485. Compare Hearing on Car Service Shortage before the Senate Subcommittee of the Committee on Interstate Commerce, May 3, 1917, S. 636, 65th Cong., 1st sess., p. 30.

conditions were such as to justify entry of the order under the emergency powers, if these include the requiring of switching. The objection urged is that the emergency power conferred is limited to orders which direct the manner in which transportation service shall be rendered or which prescribe the use to be made of railroad property; and that no such authority is granted to require performance of a transportation service. The substantive question presented is one of statutory construction—the scope of the emergency power.

The Commission possessed no emergency power prior to the so-called Esch Car Service Act, May 29, 1917, c. 23, 40 Stat. 101.[*] Its provisions were amended by Transportation Act 1920; and in the amended form are introduced as paragraphs 15 and 16 of § 1 of the Act to Regulate Commerce and as paragraph 4 of § 15. 41 Stat. 476–7, 486. Paragraph 15 deals in sub-paragraphs (*a*) and (*b*) with car service; in sub-paragraph (*c*) with the common use of terminals; in sub-paragraph (*d*) with preferences in transportation, embargoes, and movement of traffic under permits. Paragraph 16 and the amendment to § 15 confer emergency power to reroute traffic and to "establish temporarily such through routes as in its [the Commission's] opinion are necessary or desirable in the public interest." None of these provisions grants in terms power to require the performance of a transportation service. The specific grant in paragraph 16 of emergency power to "make such just and reasonable directions with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of roads," and the omission of any reference to switching, tend to rebut an intention to grant the power here asserted. The order cannot be justified

[*] Except that to suspend a tariff increasing rates, as provided in the Act of June 18, 1910, c. 309, § 12, 36 Stat. 539, 552, added to § 15 of the Act to Regulate Commerce as paragraph 7.

as dealing with preferences in transportation or embargoes under sub-paragraph (*d*). Nor does the order provide for the joint use of terminals under sub-paragraph (*c*)[4]; since it does not purport to authorize the Minneapolis & St. Louis to use the tracks and terminals of the Peoria Company. The contentions mainly urged are that the order is one concerning car service under sub-paragraph (*b*)[5]; or that power to require switching should be held to have been granted by implication.

The argument that the authority of the Commission over car service should be construed to include the requiring of switching rests upon paragraph 10 of amended § 1 of the Act to Regulate Commerce.[6] But "car service" connotes the use to which the vehicles of transportation are put; not the transportation service rendered by means of them.[7] Cars and locomotives, like tracks and terminals, are the instrumentalities. To make these instru-

[4] Sub-paragraph (*c*): "to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest . . ."

[5] Sub-paragraph (*b*): "to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable."

[6] Paragraph 10: "The term 'car service' in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act."

[7] The purpose of the amendment is clearly stated in the report of the House Committee on Interstate and Foreign Commerce, submitting H. R. 10,453, enacted as Transportation Act 1920: "Section 402 amends the Car Service Act of May 29, 1917, in several particulars. Originally the term 'car service' included 'the movement,

mentalities available in emergencies to a carrier other than the owner was the sole purpose of sub-paragraphs *a*, *b*, and *c*. It is to this end only, that provision is made by paragraph 10 for the "movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property." This is substantially the same expression as was used in the Esch Car Service Act. The 1920 Act merely adds locomotives and other vehicles.

Transportation Act 1920 evinces, in many provisions, the intention of Congress to place upon the Commission the administrative duty of preventing interruptions in traffic. But there is no general grant of emergency power

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distribution, exchange, interchange, and return of cars used in the transportation of property.' As amended the term is made to include the use, control, supply, movement, distribution, etc., not only of cars, but of locomotives and other vehicles. It is further extended to include, 'the supply, movement, and operation of trains by any carrier by railroad subject to this act', and so require every carrier by railroad 'to furnish safe and adequate car service.'" House Report 456, 66th Cong., 1st sess, p. 17. In discussing the bill before the House, on November 11, 1919, Chairman Esch said: "We also give the Commission greater power in cases of emergency. You know we have had an emergent condition throughout the country many times in recent years. We want the Commission to have the power to act promptly on the spur of the moment in case of emergency in order to prevent congestion at terminals; in order to route traffic around a congested terminal so that it may reach its destination at the earliest possible date; in order to ship goods over the most direct route regardless of instructions contained in the bills of lading. We want all this power to be exercised by the Commission in an emergency. The bill gives such powers to the Commission." 58 Cong. Rec. 8315–8316. See also 58 Cong. Rec. 8529–8531; 59 Cong. Rec. 3263. The reports of the committees of the House and of the Senate on the Esch Car Service Act, and the further explanation of that bill by the chairmen in charge of it, confirm the conclusion that the term "car service" is used in this limited sense. See House Report 1553, 64th Cong., 2nd sess., pp. 2, 6–9; House Report 18, 65th Cong., 1st sess., pp. 5–8; Senate Report 43, 65th Cong., 1st sess., pp. 2–4; 55 Cong. Rec. 2018, 2020–2022, 2024–2025, 2631, 2701.

to that end; and the detail in which the subjects of such power have been specified precludes its extension to other subjects by implication. Moreover, switching service differs in character from those as to which such power is expressly granted. These involve either the use by one carrier of property of another or the direction of the manner and the means by which the service of transportation shall be performed. The switching order here in question compels performance of the primary duty to receive and transport cars of a connecting carrier. That courts may enforce such duties by a mandatory injunction, including a preliminary restraining order, has long been recognized.[8] It may be that Congress refrained, for this reason, from conferring emergency power of this character upon the Commission.

The United States contends, also, that the decree dismissing the bill should be affirmed, because under the Act of October 22, 1913, c. 32, 38 Stat. 208, 219–220, the proper venue was the District of Iowa, that being the residence of the Minneapolis & St. Louis Railroad. Compare *Illinois Central R. R. Co.* v. *State Public Utilities Commission*, 245 U. S. 493, 504, 505; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 563. The provision that suit shall be brought in the district of the residence of the party on whose petition the order was made is obviously one inserted for his benefit.[9] If there

[8] See *Toledo, Ann Arbor, etc., Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 730, 746; *Chicago, Burlington & Quincy Ry. Co.* v. *Burlington, Cedar Rapids & Northern Ry. Co.*, 34 Fed. 481. Compare *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Iowa*, 233 U. S. 334; *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128; *Union Pacific R. R. Co.* v. *Hall*, 91 U. S. 343.

[9] Prior to the Act of June 18, 1910, c. 309, 36 Stat. 539, creating the Commerce Court (which was abolished by Act of October 22, 1913, c. 32, 38 Stat. 208, 219), the venue of suits brought to enjoin or annul an order of the Commission was the district where the carrier had his principal operating office. Act of June 29, 1906, c. 3591, § 5, 34 Stat. 584, 592.

were a lack of jurisdiction in the district court over the subject matter, we should be obliged to take notice of the defect, even if not urged below by the appellee. *Mattingly* v. *Northwestern Virginia R. R. Co.*, 158 U. S. 53, 57. But the challenge is merely of the jurisdiction of the court for the particular district. The objection is to the venue. See *Camp* v. *Gress*, 250 U. S. 308, 311. This privilege not to be sued elsewhere can be waived; and it was waived both by the Minneapolis & St. Louis Railroad and the Commission. The United States was, nevertheless, entitled to insist upon compliance with the venue provision; and its objection was properly taken below. But by failure to enter a cross appeal from the court's action in overruling its objection, the right to insist upon it here was lost. The appellees can be heard before this Court only in support of the decree which was rendered. *The Maria Martin*, 12 Wall. 31, 40; *Bolles* v. *Outing Co.*, 175 U. S. 262, 268. We have, therefore, no occasion to consider whether the suit was brought in the proper district.

Reversed.